. 85-95-CFX

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			merits in excess of the page limitation filed (A-635),
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No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the court of appeals err in holding - that it is both legal and constitutional for a state to intentionally pay black employees less than white employees in the same job, so long as the original decision establishing that discriminatory wage differential was not itself the subject of a timely charge or action?

(2) Did the court of appeals err in holding that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable?

(3) Did the court of appeals err in holding that a state may satisfy its obli-

gation to desegregate a de jure system by adopting a freedom of choice plan that fails?

(4) Did the court of appeals err in holding that an employer may immunize itself from liability under Title VII by delegating its employment decisions to discriminatory a third party?

(5) Did the court of appeals err in denying class certification in this case?

PARTIES

The petitioners in this action are: P. E. Bazemore; James E. Wright; George E. McDaniel; Plese Corbett; Calvin Hargrave; Fred Belfield, Jr.; W. N. Payton, Jr.; L. C. Cooper; Chester L. Bright; Johnnie Jones, III; Lloyd L. Peace; James P. West; E. C. Short; Haywood E. Harrell; D. B. Waymer; Roosevelt Lawrence; Booker T. McNeill; Richard M. Edwards; L. E. Baldwin; Leroy James; Robert L. Lancaster; Henry Revell, Jr.; Clifton M. Grimes; Chester Stocks; Avant P. Coleman; Percy W. Williams; W. C. Stroud; Elizabeth Ivey, Administratrix of the Estate of D. O.

Ivey, deceased; Cassius S. Williams; Samuel Taylor; Fletcher Barber; R. E. Wilkins; J. H. Wallace; Eva L. Greene, Administratrix of the Estate of Cleo Rich Greene; Warren G. Barnes; Hoover M. Royals; Thelma Graves Turner, Administratrix of the Estate of J. A. Turner; S. T. Lloyd; Hernando F. Palmer; Clifton Parker; W. F. Wright; Clarence Stockton; Earl G. Swann; I. W. Murfree; J. M. Spaulding; Mary C. Martin; Alma C. Hobbs; Martha B. Thomas; Ann Coston; Esther B. Roscoe; Minnie B. Taylor; Jo Ann Fleming; Jeanette B. Sherrad; Inez W. Foster; Carrier U. Lindsey; Geraldine H. Ray; Mary I. Parham; Dianne Stanley and Dorothy M. Mobley; Louise P. Slade; Marilyn White; Pennie P.

Battle; Joyce P. Hunter, on their own behalf and on behalf of all others similarly situated; Timothy Bazemore; Eddie Watford; Willie Ryan; Alice Ballance and Herbert White, on their own behalf and on behalf of others similarly situated; Mary B. Crawford and Essie Moore, on their own behalf, and on behalf of all others similarly situated; Deborah Jean Hart, by her father and next friend, James Hart; Herman Hinton, by his father and next friend, James Hinton; Bernice Staton and Marian Staton, by their father and next friend James Staton, on their own behalf and on behalf of all others similarly situated.

The respondents are: William C. Friday, President of Consolidated University of North Carolina;

John T. Caldwell, Chancellor of North Carolina State University; George Hyatt, Jr., Director of North Carolina Agricultural Extension Service; The Board of Trustees of the University of North Carolina, a body politic and corporate; The University of North Carolina, a body politic and corporate; and Crawford Amick, Hassell Thigpen and James G. Martin, County Commissioners, on their own behalf and on behalf of all others similarly situated.

The United States of America, John R. Block, Secretary of Agriculture, and Dr. Mary Nell Greenwood, Deputy Director, Science and Education Administration Extension, were also plaintiffs in the proceedings below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	iii
Table of Authorities	xiii
Opinions Below	2
Jurisdiction	2
Statutes and Constitutional Provisions Involved.....	3
Statement of the Case	4
Reasons for Granting the Writ	13
I. Certiorari Should Be Granted to Resolve a Conflict Among The Circuits As to Whether The Application Of Racially Motivated Wage Scales Violates Title VII or the Fourteenth Amendment.....	13

Page

II. Certiorari Should Be Granted To Resolve A Conflict Among The Circuits As To The Admissibility of Statistical Evidence of Intentional Racial Discrimination 29

III. The Decision Of The Court Of Appeals Is In Conflict With Green v. School Board Of New Kent County, 391 U.S. 430 (1968) 44

IV. The Decision Of The Court Of Appeals Raises An Important Question As To The Meaning Of General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982) 49

V. The Decision Of The Court Of Appeals Is In Conflict With Eisen v. Carlisle & Jacquelin, 417 U.S. 196 (1974) 55

Conclusion 58

Page

APPENDIX

Judgment on Class-Wide Claims, August 20, 1982..... 1a

District Court, Memorandum of Decision (Class-Wide Claims), August 20, 1982 ..... 3a

Order of Dismissal as to Certain Individual Claims, August 20, 1982..... 208a

Judgment, September 17, 1982..... 213a

District Court, Memorandum of Decision (Individual Claims), September 17, 1982 ..... 216a

Opinion of the Court of Appeals, December 10, 1984 ..... 346a

Order of the Court of Appeals Denying Rehearing and Rehearing En Banc, April 15, 1985 .... 482a

TABLE OF AUTHORITIES

Cases:	Page
Arizona Governing Committee v. Norris, 77 L.Ed.2d 1236 (1983).....	53,54
Bartlett v. Berlitz School of Languages, 698 F.2d 1003 (9th Cir. 1983).....	21
Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971 (5th Cir. 1983).	19
Bowman v. County School Board of Charles City County, 382 F.2d 326 (4th Cir. 1967).....	45
Brown v. Board of Education, 347 U.S. 483 (1954).....	45
Cajidas v. Banco de Ponce, 791 F.2d 464 (1st Cir. 1984).....	24
Calcote v. Texas Educational Foundation, 578 F.2d 1251 (6th Cir. 1978).....	19
Chrisner v. Complete Auto Transit 645 F.2d 1251 (6th Cir. 1981)..	41
Clark v. Olinkraft, 556 F.2d 1219 (5th Cir. 1977).....	20
Corning Glass Works v. Brennan, 417 U.S. 18 (1974).....	27
County of Washington v. Gunther, 452 U.S. 161 (1981).....	24,25

Craik v. Minnesota State University Board, 731 F.2d 465 (8th Cir. 1984)..... 42

Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1980)..... 37,42

Delaware State College v. Ricks, 449 U.S. 250 (1980)..... 20

DiSalvo v. Chamber of Commerce, 598 F.2d 593 (8th Cir. 1978)... 21

Dothard v. Rawlinson, 433 U.S. 321 (1977)..... 29,31,34,35

Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980).. 23,24

Eisen v. Carlisle & Jacquelin 417 U.S. 156 (1974)..... 55,58

Falcon v. General Telephone, 626 F.2d 369 (5th Cir. 1980).. 39

General Building Contractors v. Pennsylvania, 458 U.S. 375 (1980)..... 49,50,55

General Telephone Co. v. EEOC, 446 U.S. 318 (1980)..... 12

Green v. School Board of New Kent County, 391 U.S. 430 (1968)..... 10,44,46,47,48

Griggs v. Duke Power, 401 U.S. 424 (1971) 44,50

Guardians Association v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980)..... 38

Guardians Association v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980) 37

Hall v. Ledex, 669 F.2d 3978 (6th Cir. 1982)..... 59

Hunter v. Underwood, 85 L.Ed.2d 222 (1985) 28

International Union of Electrical Workers v. Westinghouse, 631 F.2d 1094 (3d Cir. 1980)..... 22

Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976)..... 18,25

Lamphere v. Brown University, 685 F.2d 743 (1st Cir. 1982) 18

Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969)..... 17,25

Payne v. Travenol Laboratories, Inc., 673 F.2d 788 (5th Cir. 1962)..... 39,40

Perez v. Laredo Junior College, 706 F.2d 731 (5th Cir. 1983)..... 19

Roberts v. North American Rockwell Corp., 650 F.2d 823 (8th Cir. 1981)..... 23

Satz v. ITT Financial Corp., 619 F.2d 738 (8th Cir. 1980)..... 21

Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) 36

Teamsters v. United States, 431 U.S. 324 (1977) 27,29,30,31, 35,39

Trout v. Lehman, 702 F.2d 1044 (D.C. Cir. 1983)..... 36,42

United Airlines v. Evans, 431 U.S. 533 (1977) 16,18,19, 20,21,23

Other Authorities:

Equal Pay Act..... 27

Title VI Civil Rights Act of 1964 3,10

Title VII Civil Rights Act of 1964..... passim

28 U.S.C. § 1254(1) 3

42 U.S.C. § 1981 50

42 U.S.C. § 2000d..... 3

42 U.S.C. § 2000e-2(a)..... 3

42 U.S.C. § 2000e-5(e)..... 4

Fourteenth Amendment, U.S. Constitution ..... passim

7 C.F.R. 15.3(b)(6)(i)..... 47

Rule 23, Federal Rules of Civil Procedure 55,58

Ore. Rev. Stat. § 137.350..... 25

No. _____

IN THE

UNITED STATES SUPREME COURT

October Term, 1984

P. E. BAZEMORE, et al.,

Petitioners,

v.

WILLIAM C. FRIDAY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners P. E. Bazemore, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 10, 1984.

OPINIONS BELOW

The opinion of the court of appeals is reported at 751 F.2d 662 and is set out at pp. 346a-481a of the Appendix. The order denying rehearing, which is not reported, is set out at p.482a. The district court's memorandum of decision of August 20, 1982, regarding class claims, which is not reported, is set out at pp. 3a-207a of the Appendix. The district court's memorandum of decision regarding individual claims, dated September 17, 1982, is set out at pp. 216a-345a.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1985. A timely petition for rehearing and suggestion for rehearing en banc was denied by an evenly divided court on April 15, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 601 of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides in pertinent part

> It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire ... any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

Section 706(e) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), provides in pertinent part:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred....

Section 1 of the Fourteenth Amendment provides, in pertinent part, "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an action seeking to redress intentional racial discrimination in the operation of the North Carolina Agricultural Extension Service. ("NCAES") NCAES is a federally funded state agency which provides assistance to farmers throughout

North Carolina, and which organizes and assists the system of 4-H clubs in that state. Prior to 1965 NCAES was a de jure segregated agency operating along strictly racial lines. There were separate black and white offices in each county, with each servicing exclusively black and white citizens respectively. The several thousand state assisted 4-H clubs were also organized along racial lines. It was the avowed policy of the defendant to pay black workers lower salaries than were paid to whites in the same positions. The black and white offices were merged in 1965, but the differences in the salaries of the black and white employees performing the same jobs were never eliminated, and no steps were taken to merge the separate all-white and all-black 4-H clubs operating side by side in communities throughout the state.

This action, commenced in 1971 in the United States District Court for the Eastern District of North Carolina, was initially filed by private plaintiffs, including NCAES employees, seeking to redress a variety of forms of intentional racial discrimination alleged to exist at NCAES. In 1972 the United States of America intervened as a plaintiff in the action, advancing essentially the same claims as the individual plaintiffs. Following a lengthy trial the district court rejected on the merits all the claims of both the United States and the private plaintiffs. On appeal a divided panel affirmed the decision of the district court; Judge Phillips, dissenting, insisted that the denial of relief was an error as a matter of law.

A timely petition for rehearing was filed, together with a suggestion for rehearing en banc. Five members of the

fourth circuit voted to grant rehearing en banc, Judges Winter, Murnaghan, Sprouse, Ervin, and Phillips. The court of appeals was evenly divided on the petition, and rehearing en banc was therefore denied.

This case presents several somewhat interrelated claims of intentional discrimination. First, the plaintiffs alleged that the different salary scales established prior to 1965 for black and white workers hired prior to 1965 still remained in effect, and that blacks hired before 1965 continued to be paid less than white colleagues holding the same positions. The district court and the court of appeals concluded that pre-1965 pay differentials for black and white workers indeed remained in effect,[1] but both courts held that the continued use of such differentials violated neither Title VII

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[1] 30a-31a, 122a, 201a, 359a, 360a, 390a.

nor the Fourteenth Amendment.[2] Judge Phillips dissented, insisting that those salary differentials were both illegal and unconstitutional.[3]

Second, the plaintiffs alleged that NCAES engaged in intentional racial discrimination in fixing the salaries of workers hired after 1965, and in determining raises for pre-1965 hires. The plaintiffs introduced statistics demonstrating that the average salaries of white workers were consistently higher than the average salaries of black workers in the same jobs and with the same amount of seniority and education. Both courts below concluded that proof that black and white workers holding the same position were paid different salaries was as a matter of law devoid of evidentiary significance, and could provide no support

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[2] 122a, 380a-82a.

[3] 462a-66a.

for the claims of intentional racial discrimination in compensation.[4] Again Judge Phillips dissented, arguing that such statistical evidence clearly demonstrated intentional racial discrimination in compensation.[5]

Third, the plaintiffs alleged that the defendants had engaged in intentional racial discrimination in selecting the County Chairmen, the salaried official responsible for supervising the NCAES office in each county. The record showed that between 1965 and 1981 no black had ever been appointed to a county chairmanship for which a white male also applied; of 123 appointments in this period, only 6 went to blacks, and only one black County Chairman was appointed prior to 1976. The court of appeals agreed that there was evidence of discrimination, but concluded

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5 131a-136a, 389a, 392a.

448a-462a.

that any discrimination was on the part of local officials to whom NCAES delegated decisions between black and white applicants, and that NCAES was immune from liability for such discrimination.[6]

Fourth, the plaintiffs asserted that continued state assistance to several thousand single race 4-H clubs violated both Title VI and the Fourteenth Amendment. Following the enactment of Title VI, the defendants had adopted a freedom of choice plan that failed; there were 1,474 all-white clubs in 1965, and 1,348 all-white clubs in 1980. Despite this Court's decision in Green v. School Board of New Kent County, 391 U.S. 430 (1968), both courts below held that NCAES was under no obligation to take any steps to desegregate the clubs.[7] Judge Phillips dissented, contending that the majority

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[6] 412a-13a.

[7] 165a-184a, 424a, n. 128.

opinion erred in refusing to comply with Green.[8]

Fifth, the private plaintiffs presented individual claims of discrimination in compensation or in promotion to the position of County Chairman. Both courts below regarded the resolution of these claims as controlled by their views of the merits of the related class-wide claims.[9]

Finally, the district court believed class certification in a private Title VII case was impermissible if, as here, the United States had filed a pattern or practice action.[10] Judge Phillips insisted

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9 469a-481a.

218a, n.70, 380a. Petitioners believe that this position was essentially correct. Reversal by this Court on the pattern and practice issue would necessarily require reversal of disposition of the individual claims. For that reason, the disposition of the individual claims is encompassed within questions 1, 2 and 5.

10 45a.

that this reasoning was inconsistent with General Telephone Co. v. EEOC, 446 U.S. 318 (1980),[11] and the majority declined to defend it.[12] The majority, however, held that denial of certification was proper, because it rejected on the merits the legal claims which petitioner sought to present on behalf of the claims. Judge Phillips again dissented.[13]

Petitioners sought rehearing en banc on each of these issues, and five members of the court of appeals voted to rehear all of them en banc.

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[11] 432a-33a.

[12] 372a-73a.

[13] 426a-33a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE APPLICATION OF RACIALLY MOTIVATED WAGE SCALES VIOLATES TITLE VII OR THE FOURTEENTH AMENDMENT

The decision in this case marks a clear and dangerous departure from what until now has been the uniform view of seven circuits regarding the legality of racial discrimination in salaries. For fifteen years every appellate court which has considered this issue has concluded that, where an employer intentionally establishes different salaries for white and black employees because of their race, that practice violates Title VII and the Fourteenth Amendment, where applicable, as long as that pay differential remains in effect. Every prior decision has held discrimination in compensation to

be continuing violation, recurring anew with each pay period.

The panel opinion in this case now adopts the opposite rule. The facts with regard to this issue are not in dispute. Prior to 1965, when many of the petitioners were initially hired, North Carolina's Agricultural Extension Service was operated as a de jure segregated system. Black employees worked in separate offices, serviced only black citizens, and were deliberately paid less than white employees doing the identical work in the white offices. In 1965 the offices were merged, but no changes were made in the salaries; black and white employees worked side by side performing the same duties but continued to receive different salaries. Both courts below found that these racially based salary differentials continued well past 1971, the year in

which this action was filed,[14] and petitioners contend that those disparities persist to this day.[15] The fourth circuit, however, held that these practices violated neither Title VII nor the Fourteenth Amendment. (80a-82a). The majority opinion holds, not only that North Carolina is free to pay blacks hired prior to 1965 less than whites for the rest of their lives, but that the state may in the future give black employees smaller raises than comparable whites so long as those raises are based on the racially motivated pay schedules established in the past. (390a).

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[14] 30a-31a, 122a, 201a, 359a, 360a.

[15] The fourth circuit noted, "the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all of such disparity." 390a.

The majority below believed that this extraordinary conclusion was required by this Court's decision in United Airlines v. Evans, 431 U.S. 533 (1977), a reading of Evans that has been expressly rejected by several other circuits. The fourth circuit reasoned that the only discrimination in compensation forbidden by Title VII or the Fourteenth Amendment is an employer's initial decision establishing the level of compensation for an individual or position; the continued application of that racially based rate of pay, which may recur over years or even decades, was held to be entirely lawful. Judge Phillips dissented, insisting that Evans did not sanction the use of "a "pattern of salary discrimination that carries forward differentials originating" prior to the adoption of Title VII or prior to the commencement of the relevant limitations period. (462a-466a). But the

majority held that the Constitution forbids only the creation, but not the implementation, of separate and unequal wage scales for blacks and white, and concluded that the Congress that adopted Title VII did not wish to affect the salaries of blacks then being paid less than whites for doing the same work, but intended to leave an entire generation of women and minorities in that inferior position so long as they continued to hold the same jobs that they held in 1965.

Seven circuits over 15 years have uniformly rejected this interpretation of Title VII and the Fourteenth Amendment. As early as 1969, in a decision joined by then circuit judge Blackmun, the eighth circuit held in Norman v. Missouri Pacific Railroad, 414 F.2d 73, that discrimination in compensation was a "continuing" violation of the law. 414 F.2d at 84-85. The controversy in Norman concerned

pre-Act pay differentials that dated from 1918. 414 F.2d at 76, 81. In Laffey v. Northwest Airlines, Inc., the District of Columbia circuit also concluded that discrimination in salaries was a continuing violation, and afforded relief to correct pay differentials that had been established in 1947 and that had first been applied to the lead plaintiff in 1958. 567 F.2d 429, 437-38, 473 (D.C. Cir. 1976).

This Court's decision in United Airlines v. Evans made clear that claims of continuing violations were to be closely scrutinized, but until the instant case all circuits remained in agreement that Title VII forbade the application as well as the creation of a racially based compensation scheme. In Lamphere v. Brown University the first circuit held that Evans did not permit an employer to pay

a female employee a lesser wage based on a discriminatory pre-Act salary schedule:

> A discriminatory ... decision, made prior to the effective date of the Act, but implemented post-Act, is actionable .... [A] decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights.

685 F.2d 743, 747 (1st Cir. 1982). Twice since this Court's decision in Evans, the fifth circuit has held that salary discrimination is a continuing violation, and that, in addition to the original decision establishing a salary scale, "each discriminatory pay check violates the act." Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971, 980 (5th Cir. 1983).[16] In Hall v. Ledex,

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[16] Berry discussed Evans at 715 F.2d at 971. A similar interpretation of Evans can be found in Perez v. Laredo Junior College, 706 F.2d 731, 733-34 (5th Cir. 1983). In Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978) a black and a white with similar credentials were hired

669 F.2d 397 (6th Cir. 1982), the plaintiff complained that when she was named to a supervisory position she was paid only two-thirds of the salary given to men in that job. The defendant asserted the action was untimely, since the plaintiff had not filed her complaint with EEOC until over a year after her salary was fixed.[17] The sixth circuit rejected that contention, insisting "the discrimination was continuing in nature. Hall suffered a

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to do the same work but given different job titles and salaries. The Fifth circuit held that the defendant was in violation of Title VII even though later it placed both employees in the same classification, since each kept "his prior salary level." 578 F.2d at 96-97. In Clark v. Olinkraft, 556 F.2d 1219 (5th Cir. 1977), decided shortly after Evans, the fifth circuit upheld the plaintiff's contention that salary discrimination in 1974, although based on wages established in 1964, was "a continuing and unlawful employment practice in violation of Title VII." 556 F.2d at 1222.

[17] The defendant relied in particular on Delaware State College v. Ricks, 449 U.S. 250 (1980). See 669 F.2d at 399.

denial of equal pay with each check she received." 669 F.2d at 398.

Similarly, the eighth circuit has reiterated since Evans its view that salary discrimination is a continuing violation. In Satz v. ITT Financial Corp., 619 F.2d 738 (8th Cir. 1980), the plaintiff did not file a charge with EEOC until more than 180 days after her employer set her salary at a level lower than that of men doing the same work. The court of appeals rejected the employer's contention that the charge was untimely, holding that "[t]he practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues." 619 F.2d at 743.[18] In Bart-

[18] See also Di Salvo v. Chamber of Commerce, 598 F.2d 593, 595 (8th Cir. 1978) (salary discrimination claim upheld despite the fact that the disputed salary was fixed more than 180 days prior to the filing of a charge.)

lett v. Berlitz School of Languages, 698 F.2d 1003 (9th Cir. 1983), the employer made precisely the argument sustained by the fourth circuit in this case, that only the original action establishing an employee's wages violates Title VII.[19] The ninth circuit rejected that contention, holding that "paying lower wages to female employees on each payday constitutes a 'continuing violation'". 698 F.2d at 1004. The third circuit dealt with claims similar to those in the instant case in International Union of Electrical Workers v. Westinghouse, 631 F.2d 1094 (3d Cir. 1980), in which the plaintiffs alleged that the employer's wage scales, which provided the lowest salaries for predominantly female jobs, had been established

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[19] See 698 F.2d at 1005 n. 1: "Berlitz's primary argument is that the limitations period should run from the date the plaintiffs became [employees] because it was at this time that their allegedly discriminatory wages were set."

as the result of an intentional policy to discriminate against women. 631 F.2d at 1097. The third circuit held that those allegations stated a cause of action under Title VII, despite the fact that the salary scales at issue had been created in the 1930's, a generation prior to the adoption of Title VII itself.

The division in the circuits on this issue is typical of the widespread disagreements among the lower courts as to the meaning of United Airlines v. Evans. The fifth circuit has aptly described those subsequent interpretations of Evans as "inconsistent and confusing". Dumas v. Town of Mount Vernon, 612 F.2d 974, 977 (5th Cir. 1980). The courts of appeals are also divided, for example, over whether or when discrimination in hiring[20]

[20] Compare, Roberts v. North American Rockwell Corp, 650 F.2d 823 (8th Cir. 1981) (hiring discrimination a continuing violation not subject to the rule in Evans) with Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980) (hiring

or discrimination in promotions[21] constitute continuing violations of the law.

The fourth circuit's decision in this case, unless overturned, will largely emasculate the statutory and constitutional prohibitions against racial discrimination in compensation. Both Title VII and the Fourteenth Amendment, where applicable, forbid an employer to intentionally assign a lower wage to a particular position because most or all of the employees in that position are black or female. See County of Washington v. Gunther, 452 U.S. 161 (1981). But such discriminatory wage systems ordinarily were established, as was the case in

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discrimination is not a continuing violation and is thus subject to the rule in Evans).

[21] Compare Dumas, supra (promotion discrimination is a continuing violation not subject to the rule in Evans) with Cajidas v. Banco de Ponce, 741 F.2d 464, 469-70 (1st Cir. 1984) (Evans is applicable to some but not all discrimination in promotions).

Gunther,[22] long prior to the adoption of Title VII or the beginning of the limitations period relevant to the constitutional claim.[23] If, as the fourth circuit has held, only the creation of such discriminatory wage scales, but not their application, is unlawful, then Gunther and the principle it establishes would be a dead letter.

The same is true of the statutory and constitutional prohibitions against intentional racial discrimination in the fixing of salaries for particular employees. Unlike discrimination in promotions or assignments, the effects of which are often obvious to all involved,

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[22] The existence of a separate position for female prison guards dated from prior to 1955. See note at Ore. Rev. Stat. § 137.350

[23] See, e.g. Norman v. Missouri Pacific Railroad, 414 F.2d 73, 84-85 (8th Cir. 1969) (system established in 1930's); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 437-38 (D.C. Cir. 1978) (system established in 1947).

the existence of discrimination in compensation is only rarely apparent, since the victims of that practice usually do not know the salaries of their white colleagues, and ordinarily have no method of comparing their wages with those of others doing the same work. In a substantial proportion of all reported Title VII wage compensation cases, the plaintiffs were unable to detect that statutory violation until it was already too late to file a charge with regard to the initial action establishing their salaries.

The fourth circuit decision is manifestly incorrect. It is simply inconceivable that the Congress which adopted the 1964 Civil Rights Act intended to provide no redress for blacks who were then being paid less than whites for the same work. It is equally unlikely that Congress intended to prohibit judicial scrutiny of the pre-Act origins of salary

scales when it clearly contemplated such inquiries into the original purposes of pre-Act senority systems. See Teamsters v. United States, 431 U.S. 324, 356 (1977). The fourth circuit's holding that Title VII does not forbid the continued use of racially based pre-Act salary scales is squarely contrary to this Court's resolution of the same question under the Equal Pay Act. In Corning Glass Works v. Brennan, 417 U.S. 188 (1974), this Court held unlawful pre-Act discriminatory salary scales that remained in effect after the adoption of the Equal Pay Act:

> The differential ... reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

417 U.S. at 205. (Emphasis added).

As a matter of constitutional law, the decision of the fourth circuit -- that the Fourteenth Amendment forbids only the adoption, but not the implementation, of a racially motivated practice -- flies in the face of a century of Supreme Court decisions. This Court has repeatedly held unconstitutional the application of state laws adopted for racial reasons, no matter how old the laws themselves. The rule whose implementation was condemned in Hunter v. Underwood, 85 L.Ed. 2d 222 (1985), for example, had been established by the Alabama Constitutional Convention of 1901, even some eighty years before Underwood filed suit. If the North Carolina legislature had in 1964 fixed petitioner Bazemore's salary by statute, intentionally setting it at a lower level because of his race, every court in the land would have struck down that law as

unconstitutional. Surely the result is no different where, as here, the racially motivated state practice complained of was taken pursuant to an administrative decision rather than a state statute.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE ADMISSIBILITY OF STATISTICAL EVIDENCE OF INTENTIONAL RACIAL DISCRIMINATION

The fourth circuit decision in this case revives, and gives conclusive weight to, the very objection to the use of statistical evidence that this Court expressly rejected in both Dothard v. Rawlinson, 433 U.S. 321 (1977) and Teamsters v. United States, 431 U.S. 324 (1977). In Dothard the plaintiff relied on population statistics to show that an employer's hiring criteria had an adverse impact on women. The defendant urged that such data be deemed insufficient, arguing

that an analysis of actual applicants might have yielded a different result. The Court held that such speculation about the possible effect of a more refined statistical analysis was not an adequate basis for rejecting the plaintiffs' statistics:

> The plaintiffs in a case such as this are not required to exhaust every possible source of evidence.... If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made. 433 U.S. at 331.

Similarly, in Teamsters the employer objected to the significance of evidence that it employed a far smaller proportion of minorities than were present in the population. The employer insisted that half a dozen factors not considered in the plaintiff's analysis might have explained away that disparity, and presented an expert on statistics to criticize the

plaintiff's methodology.[24] But the employer adduced no statistics of its own indicating that the methodology it advocated would have yielded any different result, and this Court concluded that the plaintiff itself was under no obligation to "fine tun[e]" its statistics. 431 U.S. at 342 n. 23.

The fourth circuit in this case sustained precisely the unsubstantiated speculation objection disapproved in Dothard and Teamsters. The plaintiffs here adduced uncontroverted evidence that the average salaries of whites and blacks in the same job were consistently different, with the white average invariably higher.[25] This disparity was true for all

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[24] See Brief for Petitioner T.I.M.E.-D.C., Inc., pp. 18-20.

[25] The disparities in the wages of Associate Agricultural Agent, the single largest job title, were typical:

Year	Average Salary of Whites	Average Salary of Blacks	Difference

jobs, persisted for over a decade, and was present even when the experience and education of the employees was considered.[26] An expert retained by the defendant's conducted his own analysis of the data, and also concluded that at least until the mid-1970's there was a disparity between the salaries of blacks and whites in the same jobs. (387a). The fourth circuit, however, concluded that these disparities were "unacceptable as evidence of discrimination." (391a). It was of no significance, the court of appeals held, that the employer consistently paid whites more than similarly educated and experi-

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1970	$ 9,876	$ 8,956	$ 920
1971	10,241	9,558	682
1973	10,292	9,797	495
1974	10,244	9,840	404
1976	12,711	11,885	826
1978	14,754	13,518	1,236
1980	15,253	14,485	758
1981	17,035	15,849	1,186

App. 1562; GX 95, 98; PX 50, 100.

[26] App. 399-418; GX 122-24.

enced blacks doing the same work; no statistical analysis was entitled to any weight unless it considered "all measurable variables thought to have an effect on salary." (391a). (Emphasis added) The trial judge had speculated that there were at least nine additional variables that might have explained the disparities (133a), and the majority on appeal thought this speculative possibility fatal to plaintiffs claims. (389a-91a).

Judge Phillips correctly dissented from this aspect of the panel decision below, insisting that statistical evidence could not be rejected

> for failure to include a number of other independent variables merely hypothesized by defendants. ....[T]o apply such a rule generally would effectively destroy the ability to establish any Title VII pattern or practice claim by this means of proof . . . [I]t will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated

> by any multiple repression analysis that could be conceived. (448a-49a).

Judge Phillips stressed, as did this Court in Dothard, that there was no "evidence that the inclusion of other variables would in fact reduce" the disparities the wages of blacks and whites in the same job. (450a) (Emphasis in original). Correctly recognizing the substantial impact the majority opinion would have on the use of statistics in any future Title VII case, five members of the fourth circuit voted to rehear this case en banc.

The decision of the fourth circuit[27] sustaining the very speculation objection disapproved in Dothard and Teamsters is in square conflict with the decisions of the five courts of appeals that have dutifully followed the opinions of this Court. The District of Columbia circuit, citing Dothard and Teamsters, has rejected the fourth circuit's rule that statistical evidence should or can be rejected merely because it does not analyze every conceivably relevant factor:

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[27] The majority opinion rejected the individual claims of salary discrimination on a similar theory. Petitioners offered statistical comparisons of their wages with the wages of white agents with the same education hired at the same time into the same jobs. The majority dismissed that evidence on the ground that such comparisons did not also consider possible additional job qualifications or differences in job performance. (378a-379a). Both the majority and Judge Phillips agreed that the district court's decision rejecting the individual claims would have to be reversed if there was proof of a pattern and practice of salary discrimination. (380a, 467a).

> [U]nquantified, speculative and theoretical objections to the proffered statistics are properly given little weight by the trial court: 'When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendants may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant ... must either rework plaintiff's statistics incorporating the omitted factors or present other proof undermining plaintiff's claims.'[28]

Similarly, in a promotion discrimination case, the District of Columbia circuit insisted, contrary to the position of fourth circuit in the instant case,[29] that in a comparison of black and white

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[28] Trout v. Lehman, 702 F.2d 1044, 1102 (D.C. Cir. 1983), vacated on other grounds sub nom. Lehman v. Trout, 79 L.Ed.2d 732 (1984). See also Segar v. Smith, 738 F.2d 1249, 1277 (D.C. Cir. 1984) cert. den. ____ U.S. ____ (1985). (Omission of a variable does not affect validity of the statistics absent proof that the omission affected the outcome of the analysis.)

[29] See, n. 27, supra.

employees "not every conceivable factor relevant to a ... decision must be included in the statistical case in order to make out a prima facie case."[30]

The second circuit has also rejected the fourth circuit rule. In Guardians Association v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980), the defendant responded to evidence that its tests had an adverse impact on minorities by "hypothesiz[ing] some situations in which [the] statistics might be misleading ... but present[ed] no evidence to show that this occurred." 630 F.2d at 88 n. 7. The second circuit dismissed that objection out of hand:

> To accept such unsupported possibilities, and require the plaintiffs to refute every circumstance that could explain the disparate impact shown by the statistics, would create an onerous burden of proof, far in

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30 Davis v. Califano, 613 F.2d 957, 964 (D.C. Cir. 1980).

> excess of the Title VII standard as interpreted by the Supreme Court. See Dothard v. Rawlinson....

Id. Later in the same litigation the city again chose to object to a statistical analysis without offering a more complete analysis of its own. The second circuit, quoting Dothard at length, again rejected that approach:

> We see no justification for holding plaintiffs to an unrealistic standard regarding the "completeness" of their statistical showing.... [I]t is not inappropriate to expect a public employer to come forward with evidence ... even where the plaintiffs' showing has been somewhat modest.... [D]efendants offered no persuasive evidence of differences in preparation or content that would cast doubt on [their statistical] conclusion....

Guardians Association v. Civil Service Commission, 633 F.2d 232, 240 n. 13 (2d Cir. 1980).

The fifth circuit has adhered to the same view of statistical evidence as the District of Columbia and second circuits. In Falcon v. General Telephone, 626 F.2d 369 (5th Cir. 1980), rev'd on other grounds 457 U.S. 147 (1982), the fifth circuit interpreted Teamsters

> to mean that once the plaintiff has offered some evidence that is probative of disparity that may be statutorily significant, it is then the defendant's burden to come up with more specific statistical evidence to rebut the plaintiff's proof.

626 F.2d at 381. (Emphasis added.) This requirement that statistics be rebutted with evidence, not merely with speculative objections, was applied in Payne v. Travenol Laboratories, Inc., 673 F.2d 788 (5th Cir. 1982), which also relied on Teamsters. The defendant in Payne responded to evidence that white applicants were hired at a higher rate than

black applicants by hypothesizing that black applicants might have failed in disproportionate numbers to actually attend scheduled interviews. The fifth circuit agreed that this was an important consideration, but rejected defendant's argument because the defendant had adduced no evidence of any such disproportion:

> [A] comparison of referred applicants to actual hires omits an important variable: how many applicants Travenol failed to interview because they did not show up. Theoretically, this point is well taken, but its major premise is speculative.... [T]he record indicates there was no evidence how many applicants did not keep their interview dates.

673 F.2d at 822. The defendant in Payne also speculated that the number of black applicants might be inflated because blacks might have filed more duplicate applications than whites. Again the fifth circuit rejected that sort of objection,

insisting that a defendant come forward with evidence to support its contentions that a more complete statistical analysis would have yielded different results.[31]

The rule expressly adopted by the second, fifth and District of Columbia circuits has been applied by at least two other courts of appeals. In Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981), the plaintiffs, in seeking to prove that a two year experience requirement would have an adverse impact on female applicants, adduced evidence as to the proportion of men and women employed in the industry involved. The sixth circuit, citing one of the

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> "[T]here was no testimony that black duplicates occurred at a greater rate than white duplicates, and we are unwilling to make such an assumption without evidence in the record to support it."

673 F.2d at 822.

District of Columbia cases noted above,[32] held this evidence "sufficiently probative" of disparate impact to establish a prima facie case, and stressed that the defendant had failed to offer "countervailing evidence" to rebut the inference that arose from the plaintiff's rather general data. 645 F.2d at 1259. In Craik v. Minnesota State University Board, 731 F.2d 465 (8th Cir. 1984), the defendant criticized a statistical analysis offered by plaintiff because it had included some administrators among the teachers whose treatment was at issue. The eighth circuit, again citing one of the District of Columbia opinions mentioned earlier,[33] dismissed that objection, noting that the defendant had declined to offer

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[32] Davis v. Califano is cited at 645 F.2d at 1259 n. 7; see n. 30, supra.

[33] Trout v. Lehman is cited at 731 F.2d at 477 n. 15.

any evidence as to the impact of correcting this over inclusion.[34]

The panel decision in the instant case has the practical effect of forbidding the use of statistics in the fourth circuit to prove either intentional discrimination or disparate impact. As Judge Phillips noted in his dissent, no statistics could ever be sufficiently complete to meet the majority's standard, since it will always be possible for a defendant or a court to conceive of some other factor that might have been considered in any statistical analysis. Without the use of statistics, proof of discriminatory intent will often be impossible. Since statistics are the only

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[34] "The effect of the inclusion of such a small proportion of administrators is not obvious, and the defendants chose not to rework the multiple regression analyses on a corrected data base in order to demonstrate that the result would be more favorable to them." 731 F.2d at 477 n. 15.

method by which a plaintiff can establish that a test or job requirement had a disparate impact, the fourth circuit's decision effectively nullifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Maryland, Virginia, West Virginia and the Carolinas today,the enforcement of Title VII has been severely impeded. Certiorari should be granted to correct that situation and to resolve the inter-circuit conflict created by the decision below.

III. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH GREEN V. SCHOOL BOARD OF NEW KENT COUNTY, 391 U.S. 430 (1968)

The panel decision in this case marks the resuscitation of a fourth circuit remedial doctrine unanimously condemned by this Court some 18 years ago.

In Green v. School Board of New Kent County, 391 U.S. 430 (1968), the officials of the de jure segregated school system

adopted, in response to Brown v. Board of Education, a "freedom of choice" plan which left students in the schools to which they had originally been assigned on the basis of race, but permitted them to transfer elsewhere on their own initiative. Not a single white child chose to attend a black school, and 85% of all black children remained in black schools. The plan "operated simply to burden children and their parents with a responsibility which Brown II places squarely on the School Board." 391 U.S. at 441-42. The fourth circuit held, however, that that manifestly unsuccessful freedom of choice plan fully satisfied the requirements of Brown, and that there was no longer any actionable violation of the constitution. See Bowman v. County School Board of Charles City County, 382 F.2d 326, 327-28 (4th Cir. 1967).

This Court unanimously reversed, holding that freedom of choice plans were only acceptable if they in fact disestablished the de jure system that the state had created:

> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now . . . [I]f [freedom of choice] fails to undo segregation, other means must be used to achieve this end. The Board must be required to formulate a new plan ... which promise[s] realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

391 U.S. at 437. Following the decision in Green, the United States Department of Agriculture adopted regulations governing the desegregation of programs such as the North Carolina 4-H clubs:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race ... the recipient must take affirmative action to

> overcome the effects of prior discrimination.

7 C.F.R. §15.3(b)(6)(i). The requirements of this regulation parallel those of Green itself.

The 4-H clubs in North Carolina were for years operated on a strictly de jure segregated basis.[35] Separate all-black and all-white clubs existed in the same communities. In 1965 state officials adopted a freedom of choice plan similar to that in Green, and in North Carolina that plan failed just as it had in Green itself. In 1965, prior to the adoption of the freedom of choice plan, there were 1,474 all-white 4-H clubs; after 15 years of freedom of choice there were 1,348 all-white clubs.[36] Between 1972 and 1980

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[35] The history of Extension Homemaker Clubs, which are also supported by NCAES, is essentially similar to that of the 4-H Clubs.

[36] App. 1806, 2237; Ex. 11, 115; 472a.

the number of single race clubs in racially mixed communities declined by less than 2%.[37] Far from converting the North Carolina system from "black" clubs and "white" clubs to just clubs, the freedom of choice plan had what Judge Phillips accurately described as only a "minimal" effect. (471a).

The panel opinion in the case did not suggest that the 1965 freedom of choice plan had succeeded. Rather, the majority adopted precisely the position taken by the fourth circuit in Green itself -- that a state which establishes a de jure segregated system need do no more to meet its legal obligations than refrain from new additional acts of discrimination. (368a,424a, n.128).[38] As Judge Phillips

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[37] App. 1807, 1813; 472a.

[38] The evidence also clearly indicated a pattern of post-1965 intentional racial discrimination in the recruiting of club members (475a-77a). Again, the majority evidently believed that the very existence of a freedom of choice plan fully remedied

noted in his dissent, the opinions below do not even purport to find that the defendants satisfied the requirements of Green or of the Department of Agriculture regulations. (474a-75a). The panel majority was apparently of the view that the fourth circuit is somehow free to refuse at will to enforce either Green or the duly promulgated applicable federal regulations. No reasons were given by the majority for its refusal to do so, and no legitimate basis for that action is conceivable.

IV. THE DECISION OF THE COURT OF APPEALS RAISES AN IMPORTANT QUESTION AS TO THE MEANING OF GENERAL BUILDING CONTRACTORS v. PENNSYLVANIA, 458 U.S. 375 (1982)

Three years ago in General Building Contractors v. Pennsylvania, this Court

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any injuries that might be occasioned by such ongoing discrimination.

held that section 1981 permits an employer to delegate its hiring decisions to a third party which engages in intentional racial discrimination. In rejecting Pennsylvania's argument that section 1981 imposed a non-delegable duty to hire on a non-racial basis, the Court stressed that liability under section 1981 required proof of discriminatory intent on the part of the employer.

The fourth circuit decision in this case extends the holding in General Building Contractors to Title VII, despite the fact that Title VII, unlike section 1981, contains no such intent requirement. Griggs v. Duke Power Co, 401 U.S. 424 (1971).In selecting County Chairmen, NCAES followed one of two procedures. In most instances NCAES made the decision itself, approving only a single applicant and forwarding his or her name to elected county officials for a pro forma ratifi-

cation. In some cases, however, NCAES would recommend several candidates to the county officials, and delegate to those local authorities the final selection.

The record in this case made clear that county officials invariably exercised any such delegated authority in a racial manner and the Court of Appeals did not hold otherwise. In every instance in which NCAES recommended both a black and a white applicant, the county officials chose to select the white applicant. As a result, although blacks account for 25% of the full agents, the position from which County Chairmen are chosen, only 2.6% of the County Chairmen selected between 1962 and 1981 were black. (406a).

The fourth circuit, however, concluded that Title VII permitted NCAES to delegate its selection decisions to discriminatory county officials. NCAES, it held, was "not separately responsible

for the appointment" decisions made by such county officials. (412a). So long as NCAES "recommended" blacks as well as whites, the agency was not legally accountable if, as invariably occurred, county officials chose only whites. In the fourth circuit's view it was irrelevant that this delegation practice had a 100% adverse impact on black applicants or that NCAES officials must have been aware of the county level discrimination. Nor did the fourth circuit think it important that in this case NCAES resorted to delegation in a racially selected manner. Although NCAES approved only a single applicant in 83% of all cases,[39] NCAES has never recommended a black for a job which a white male had applied without also recommending at least one white male as

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[39] NCAES recommended only a single applicant in 94 of 113 cases. See charts following 419a.

well.[40] The court of appeals insisted that NCAES was immune from liability so long as it was "recommending" a substantial number of blacks, regardless of whether the counties were invariably and predictably rejecting all of those black applicants.

The decision below is squarely inconsistent with this Court's opinion in Arizona Governing Committee v. Norris, 77 L.Ed.2d 1236 (1983). In Norris, the defendant insisted that it could not be held liable for discrimination engaged in by independent operators of a pension plan funded by the defendant employer. This Court rejected that contention, holding that under Title VII "employers are ultimately responsible for the 'compensation, terms, conditions, [and] terms of employment'." 77 L.Ed.2d at 1292. It reasoned, "We do not think it makes

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[40] In the only two instances in which NCAES recommended only a black for a position for which a white had applied, the white applicant was a woman. Id.

any . . . difference . . . that the employer engaged third parties to provide a benefit rather than directly providing the benefit itself." Id. at 1292 n. 21. The decision here whether to promote to County Chairman blacks as well as whites is as central to the employment relationship, and as non-delegable, as was the decision in Norris whether to provide to female employees the same pensions that were accorded to male workers.

The fourth circuit decision in this case is an open invitation for employers to evade the requirements of Title VII. Under the principles of the decision below, an employer is free to delegate to a third party any employment decision that might violate the law. Thus, while an employer may not select its workers on the basis of a non-job related discriminatory test, it could legally delegate hiring authority to an agency or individual that

utilized that very test. Such a rule represents a radical and unwarranted extension of General Building Conractors and should be reconsidered by this Court.

V. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH EISEN v. CARLISLE & JACQUELIN, 417 U.S. 156 (1974)

A decade ago in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), this Court made clear that Rule 23 class actions were not to be limited to claims which a court had already decided were meritorious. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs . . . will prevail, but rather whether the requirements of Rule 23 are met." 417 U.S. at 178. Eisen reiterated the purpose and standards of Rule 23, which was framed to provide an opportunity for the resolution of class-wide claims, some of which would, of course, inevitably prove unsuccessful.

The district court decision in this case denied certification on grounds which the fourth circuit declined to sustain.[41] The panel majority, however, insisted that this case could not be certified as a class action because there were no meritorious class claims. Petitioners alleged a class-wide state practice of perpetuating pre-Act intentional wage discrimination; the fourth circuit denied certification as to that issue because it believed the practice to be lawful.[42] Petitioners alleged that the state had a non-delegable duty to select County Chairmen on a racially neutral basis; the

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[41] The district court held (1) that no class action could be maintained in a private Title VII action if the United States filed a related pattern and practice action (44a-46a), and (2) that no class action could ever be maintained on behalf of employees working at different locations. (43a-44a). Judge Phillips described the errors underlying this reasoning in his dissent. (426a-433a).

[42] Compare, 369a with 380a-82a.

fourth circuit denied certification as to that issue because it believed there was no such duty.[43] Petitioners alleged that the continued operation of over a thousand single-race 4-H clubs violated both the Constitution and the applicable federal regulations; certification was denied on the ground that the fourth circuit believed the operation of those clubs to be entirely legal.[44]

On the fourth circuit's view, class certification cannot be granted unless the party seeking certification proves, or at least alleges, a "legally cognizable wrong." (372a). In this case the court below concluded that the facts in the record did not constitute a "legally cognizable wrong" because the fourth circuit rejected on the merits petitioners' contentions as to the legal

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43 369a-370a.

44 370a-371a.

principles applicable to those facts. But Rule 23 is available for the litigation of "common issues of law" as well as common issues of fact. The decision below that there were no "legally cognizable wrongs" constitutes, not a finding that there were no such common issues of law, but an adverse resolution of those very common issues. Eisen forbids denial of class certification on such a basis.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the fourth circuit.

Respectfully submitted,

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July 15, 1985

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No. .....

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JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed August 20, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,
Plaintiffs,

AND

UNITED STATES OF AMERICA, et al.,
Plaintiff-Intervenors,

VS.

WILLIAM C. FRIDAY, et al,
Defendants.

JUDGMENT ON CLASS-WIDE CLAIMS

For the reasons stated in the court's memorandum of decision this day filed it is now

ORDERED, ADJUDGED AND DECREED that the United States as plaintiff-intervenor is not entitled to recover of the defendants, or any of them, by reason of any matters alleged in the original complaint in intervention or the amended complaint in intervention and that the action of the plaintiff-intervenor be and the same is hereby dismissed with costs.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 20, 1982.

By s/s
Deputy Clerk

IN THE
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FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
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Plaintiff-Intervenors,

VS.

WILLIAM C. FRIDAY, et al,
Defendants.

MEMORANDUM OF DECISION
(CLASS-WIDE CLAIMS)

This action instituted in this court on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (Extension Service) alleging racial discrimination in

employment and the provision of services came on for trial in December, 1981, and was tried to the court without a jury over a period of approximately ten weeks.[1] In this memorandum of decision the court will record its findings of fact and conclusions of law in conformity with Rule 52, F.R. Civ. P.

BACKGROUND

The action was based on alleged viotions of the First, Fifth and Fourteenth Amendments to the Constitution, 42 U.S.C. §§ 1981, 1983 and 2000d, and 7 U.S.C. §

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[1] To some extent the inordinate delay between the filing date of the suit and trial is attributable to docket conditions in this court over the last ten years, but perhaps to a greater extent to the action (and sometimes inaction) of the parties in obtaining amendments to the pleadings, extensions of time to complete discovery, motions for continuance, failure to press for a trial and their intermittent assurances to the court that a settlment of all matters in controversy was probable.

341, et seq. The United States intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1. Named originally as defendants in the action, the Secretary of Agriculture and the Administrator of the Federal Extension Service were re-aligned as plaintiff-intervenors on July 21, 1972.

The United States amended its complaint in intervention on February 28, 1975, to include allegations of racial discrimination against black and Indian employees in violation of Section 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.

The defendants are William C. Friday, President of the University of North Carolina (which comprises the sixteen

institutions of higher education in the state), the Chancellor of North Carolina State University, the Director of the Extension Service, the Board of Governors of the University of North Carolina, North Carolina State University (NCSU), and its School of Agriculture of which the Extension Service is a part; and Alamance, Edgecombe and Mecklenburg Counties.

In addition to their answers containing general denials the defendants filed a third-party complaint against the Secretary of Agriculture and the Administrator of the Federal Extension Service alleging discriminatory application of the civil rights regulations of the Department of Agriculture. The order re-aligning the parties ordered that this third-party complaint be treated as a counterclaim.

North Carolina State University, a land grant university located at Raleigh, administers the state's extension program the purpose of which is to aid in the dissemination of "useful and practical information on subjects relating to agriculture and home economics." Funds for the program are provided by the federal government under the Smith-Lever Act of 1974 (7 U.S.C. § 341, et seq.); by the State of North Carolina and each of the 100 counties in the state in the approximate ratios of forty per cent federal, forth-three per cent state and

seventeen per cent county.[2]

The Extension Service is a division of the School of Agriculture and Life Sciences at NCSU at Raleigh. The present head of the Extension Service is its Director, Dr. Chester Black who assumed the position on January 1, 1982. Dr. Black, a white male, is also Associate Dean of the School of Agriculture and Life Sciences. He is directly responsible to the Dean of that school and ultimately responsible to the Chancellor or NCSU, its Board of Trustees, the President of the University of North Carolina and the Board

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[2] Prior to 1978 funds for extension programs carried out by North Carolina A & T State University (A&T), a predominantly black institution located at Greensboro, North Carolina, were made available through the State Director of Cooperative Extension, but since then have been appropriated un-der Section 1444 of the Food and Agri-cultural Act of 1977 (1890 Program) and are made available tothe Administrator of the 1890 Extension Programs at A & T.

of Governors of the University of North Carolina for the operations of the Extension Service. The position of Director of the Extension Service has always been held by a white male.

Responsibilities of the Director include programming, planning, managing, personnel, staffing, budgeting, staff organization, selection of staff, assignment, promotion of personnel, and the development and implementation of policies relating to employment and the delivery of services of the organization.

The Associate Director of the Extension Service holds the second highest position in the organization. Prior to his elevation to the directorship on January 1, 1982, the position of Associate Director was held by Dr. Black. Responsibilities of the position include overall

administration, budget and organizational management. This position has always been held by a white male.

Directly beneath the Associate Director are five Assistant Directors of the Extension Service, each with responsibility in one of these areas: staff development, 4-H, home economics, agriculture and special programs and county operations. The Assistant Director for Home Economics is a white female. The remaining four Assistant Directors are white males.

The state is divided into six districts, the north central, northeastern, northwestern, southeastern, southwestern and western. Each district is headed by a District Extension Chairman who is responsible for administering all Extension Service programs within the district. He or she coordinates the program efforts

of all agents and specialists within the district, interprets administrative policy, develops and maintains budget for the district and makes recommendations to the Director with respect to the hiring, promotion and salaries of personnel within the district. Of the District Extension Chairmen at this time one is a black female, one is a white female and the remaining four are white males.

The top administrative position in the Extension Service in each of the 100 counties of North Carolina is that of the County Extension Chairman. Under the supervision of the District Extension Chairman the County Chairman coordinates all Extension Service activities within his county and is responsible for developing an effective county extension program. He is responsible for organizing and allocating resources, preparing the

County's extension budget, making recommendations to the District Chairman with respect to the hiring, promotion, evaluation and salary of all county-level extension personnel. The County Chairman reports to the District Extension Chairman who reports to the Assistant Director for County Operations. The County Extension Chairman also reports to the Board of County Commissioners in his county on extension programs and matters relating to budgeting and personnel.

In addition to the employees in the managerial chain of command the Extension Service employs some twenty-five or more "Specialists" whose responsibilities are to provide technical assistance to the agents in the counties. Most of the Specialists are employed at NCSU in Raleigh. Their areas of responsibility include such subjects as adult and

community college education, agricultural communications, animal husbandry, dairy husbandry, food science, 4-H, home economics, horticulture and wildlife. A Specialistsis one who has technical expertise in a particular subject matter and/or does research in a particular area or matter and renders technical assistance in that field. They keep agents and recipients of extension services informed of new developments within their areas of specialization, assist in planning, implementing and evaluating extension programs. Most Specialists serve the entire state, but a few of them work within a limited geographic area. Approximately two-thirds of the Specialists have PhD degrees.

There are twelve district program leaders with responsibility for specific programs in the areas of home economics,

agriculture, community development and 4-H in assigned districts. Program leaders also kprovide admi8nistrative assistance to the District Extension chairman with respect to personnel and programs within the districts to which they are assigned.

There are two positions for state agents in home economics, and at the present time one of the positions is filled by a white female and the other by a black female. The latter is primarily responsible for the Extension Service's Expanded Food and Nutrition Education Program (EFNEP).

The Extension Service renders services in four major extension program areas: home economics, agriculture, 4-H and youth, and community resource development.

The home economics program helps families solve problems and improve the quality of their lives in the areas of food, nutrition and health; housing, energy and environment; clothing and textiles; family resource management; and human development and aging through educational programs and an extensive volunteer organization within each county.

There are three ranks of home economics agents: home economics agent, associate home economics agent and assistant home economics agent. Ordinarily these positions are held by females.

One of the functions of the home economics agents at the county level is to help women organize "homemaker clubs." These clubs are associations of women who receive lessons in home economics from the county agents and from their own members. Although membership in these clubs is

entirely voluntary, home economics agents regularly meet with the clubs, give lessons to them and train individual club members to give home economics lessons to their members.

Another function of the Extension Service is to operate the EFNEP program the purpose of which is to improve the diets of poor families and to increase their effective utilization of public assistance food programs. The program uses non-college graduate para-professionals as "program aides" who work on a part-time basis under the day-to-day supervision of the county home economics agent responsible for the food and nutrition program in the county. The majority of the clientele served by this program is black, and the program is financed primarily by federal funds.

There are three ranks of agricultural extension agents: agent, associate agent and assistant agent. To qualify for the position of full agent formerly required a minimum of seven years' experience with the Extension Service or equivalent experience. Since 1979 it has been six years. The position of associate agent requires a minimum of three years' experience with the Extension Service or equivalent experience, and the position of assistant agent which is the position into which one is initially employed requires no previous experience. While the three ranks of agents perform essentially the same types of tasks, when an agent is promoted his responsibilities increase and a higher level of performance is expected of him.

Each agricultural agent is assigned particular areas of responsibility by the County Chairman, and the areas of respon-

sibility normally assigned are the crops grown in the county and specific livestock. Both agricultural agents and home economics agents can also be assigned to 4-H and community development.

The 4-H and youth program is operated in each of the 100 counties of the state and on the Cherokee Indian reservation. This program is designed to develop good character and citizenship and to teach youth useful and practical skills. Participants have the opportunity to select from nearly fifty different areas of study including archery, beef, clothing, foods and nutrition, home environment, bicycle repair and safety, electricity, entomology, horticulture, conservation, forestry and veterinary science. The Specialists at NCSU and A & T prepare

the subject matter instruction and related activities that attract 4-H youth to the program.

One of the functions of the county agents assigned 4-H as an area of responsibility is to help organize and serve 4-H clubs. Prior to the early 1960's these clubs were organized in the public schools and county 4-H agents would meet with the clubs during school hours and present educational programs to them. Thereafter the clubs were moved out of the schools and were organized on a community basis with adult volunteers serving as leaders of the clubs.

Community resource development (CRD) programs deal primarily with problems that require group or community action. The CRD programs vary from county to county depending on the needs of the counties over a period of time. Many of the

counties have developed programs that are similar in nature such as land use planning and organization of volunteer fire departments.

EMPLOYMENT WITHIN THE EXTENSION SERVICE

The salaries of Extension Service agents and county chairmen consist of a federal share, a state share and a county share. The federal government allocates a sum of money to the Extension Service each fiscal year, and the boards of county commissioners in each of the one hundred counties in the state, in conjunction with the Extension Service, determine how much each county will pay agents at the time they are hired. The county chairmen make recommendations to the county commissioners as to what the professional staffs' salaries should be. Some extension agents, such as those who work with the EFNEP, receive only federal funds.

The Extension Service has the responsibility to establish minimum requirements and qualifications for employment; to generate, receive and examine applications; to interview and screen applicants to determine their qualifications and availability; to recommend to county commissioners qualified applicants for appointment to vacant or new positions; to recommend the salaries of extension agents; to determine jointly with the county board of commissioners the share of salaries to be paid by each and to provide the state and federal share of these salaries; to prepare and submit an annual budget request to the board of commissioners for the county share of funds for salaries and expenses; to provide funds for travel in the conduct of extension

work; and to provide extension agents with official bulletins, leaflets and other publications for educational purposes.

The Extension Service also has responsibility for the administration and supervision of extension programs and personnel and to develop and administer a personnel management system that provides for (a) the annual review of each worker's performance, (b) counseling for job improvement where needed, and (c) periodic county program reviews. It provides a staff of specialists to train agents in technology and other changes affecting agriculture, home economics, 4-H and CRD and assists in the conduct of work in these areas. It provides extension workers with training program and develops and maintains a county advisory leadership system in each county.

These responsibilities of the Extension Service are set forth in a "Memorandum of Understanding" between the Extension Service and the boards of county commissioners of each county (DX 79). This agreement also outlines the responsibilities of the boards of county commissioners which include the duty to provide the county's share of salaries for extension personnel; to provide office space and equipment, utilities, telephone, office supplies, demonstration materials and other items needed for the efficient operation of the county extension office and program; to review and consider the annual budget request from the Extension Service and take appropriate action by July 1 of each fiscal year; and to confer and advise with district and county extension chairmen and extension advisory council relative to county extension

programs. With respect to employment practices the Extension Service and commissioners mutually agree as follows:

> "That all county extension appointments and separations are to be worked out jointly between the North Carolina Agricultural Extension Service and the Board of County Commissioners, and that no official action will be taken by either party regarding appointment or separation prior to discussion of the matter with the other party."

Since November, 1972 a monthly announcement of vacant county positions has been sent from the office of the Assistant Director of the Extension Service for county operations on the fifteenth of each month to all Extension Service offices in the state and certain universities. The announcement sets forth the area of responsibility, date the position is available and location and deadline for applying. Prior to December, 1980 the Assistant Director for County Operations

reviewed each application and acknowledged its receipt by letter. That function is now handled by a personnel specialist under the direction of the Associate Director of the Extension Service. To be considered from the outside for a professional position an applicant must have an overall 2.5 grade point on a 4.0 scale or a 3.0 grade point in the applicant's major field.

When a county chairman requests permission to fill a vacancy and that request is approved, the district chairman requests, and is provided, a list of applicants in the subject matter area by the personnel specialist. They review the list and obtain applications to consider for a specific position from personnel files. Applicants who possess qualifications deemed appropriate for specific positions are interviewed by district

chairmen and district program leaders. After the interviewing procedure has been completed, one or more applicants will be asked to visit with the county chairman and staff in the county in which the vacancy exists. After consultation with the county chairman and Assistant Director, County Operations, a decision is made as to who will be recommended for the position. The district chairman, working with the Assistant Director, County Operations, suggests the salary to be offered the applicant subject to county approval. The county chairman then presents the recommendation to the Board of County Commissioners or county manager for approval. Following approval the Director of the Extension Service makes the appointment.

Since 1972 the Extension Service has used throughout the state a standardized performance evaluation instrument called a "Performance Review Guide." The guide was revised in 1976, and it is used primarily as a counseling and evaluative tool. A separate Performance Review Guide for county chairmen was developed in 1970-71 and revised in 1978.

EXTENSION SERVICE PRIOR TO 1965

Prior to August 1, 1965, the Extension Service was divided into two branches, a white branch (which had no formal racial designation) and a Negro branch. The Negro branch was composed entirely of black personnel and served only black farmers, homemakers and youth. The white branch employed no blacks but did on occasion serve blacks. Both branches were headed by the Director of

the Extension Service who was white and who had the responsibility for the total operation of the service.

The Negro branch had its headquarters at A & T in Greensboro, North Carolina, an agricultural and technical college maintained by the state for the education of Negroes. The Negro branch of the Extension Service was divided into three geographical districts and maintained offices in fifty-one of the state's one hundred counties. The Negro county offices were separated from the offices maintained for white personnel.

The Negro branch of the Extension Service was headed by the "Negro state agent," a black male, who was responsible directly to the Assistant Director of Extension Service at Raleigh, both of whom were white. The responsibilities of the Negro state agent included the hiring,

assignment, salary determination, promotion, transfer, discipline and discharge of all black personnel. He also was responsible for developing the budget and a state plan of work for the Negro branch and for supervising the work of all black employees.

In each of the fifty-one counties in which the black branch of the Extension Service had offices the black organization had a counterpart in the white organization. There was no interchange of personnel between the two organizations, but black and white county agents had identical responsibilities in formulating and presenting budgets to county commissioners, developing plans of work, meeting with clubs and conducting meetings. County agent job descriptions were identical except for the appellation "Negro work" for blacks.

The salaries of black agents in the segregated system were lower than the salaries of their white counterparts, and black agents had inferior office space and facilities in the segregated system.

On August 1, 1965, which was shortly after the effective date of the Civil Rights Act of 1964, the white and Negro branches of the Extension Service were merged into a single organization with its headquarters at NCSU in Raleigh. To effectuate the merger the six white and three Negro geographic districts were eliminated and six new geographic districts were created. In conjunction with the merger various positions were eliminated and new positions were created. The position of Negro state agent at A & T was eliminated and the black male who had held this position, Mr. R. E. Jones, became an

Assistant Director of the Extension Service. He continued to maintain his office at A & T in Greensboro.

This unification and integration of the Extension Service did not result immediately in the elimination of some disparities which had existed between the salaries of white personnel and black personnel, and during the course of the transition from a segregated to an integrated system some black agents and black female home economics agents lost some of their job responsibilities.[3]

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[3] Conditions as they existed before the merger and their effects on post-merger conditions are set forth only as relevant background evidence in connection with the Title VII claims in this case which did not arise until March 24, 1972, the effective date of the amendments to the Civil Rights Act of 1964 pursuant to which public employers became subject to the Act.

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a dis-criminatory act which occurred

The foregoing findings are designed to afford an overview of the employment practices of the Extension Service and the two branches of the service which existed before the merger in 1965. More detailed facts are contained in the proposed findings of fact submitted by the parties, and the court adopts as its own and incorporates herein by reference portions of such proposed findings as follows:

Plaintiff-Intervenor (hereinafter "the government": Findings numbered 12-37 inclusive; 46; 48 - 59 inclusive; 66-71 inclusive; 73 and 74.

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before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately con-sidered,it is merely an unfortu-nate event in history which has no present legal consequences." United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

Defendants: Findings numbered 5-35 inclusive together with all stipulations of fact set forth in the pre-trial order.

THE CLASS ACTION QUESTION

This action was originally instituted in the names of sixty-five individual plaintiffs, seemingly large enough to constitute a class within themselves, but they nevertheless alleged "across the board" discrimination and sought to have the action certified as a class action under Rule 23, F.R. Civ. P. It was proposed that a plaintiffs' class be certified to include all black employees of the Extension Service who have been subjected to employment discrimination by defendants; all black persons in North Carolina who have been denied services or provided inferior services by the Extension Service; all black females in North Carolina who have been excluded from

membership in all white extension homemaker clubs solely because of their race; and all black children in North Carolina who are excluded from all white 4-H clubs solely because of their race.[4]

Plaintiffs also proposed that a defendants' class be certified to include the boards of county commissioners of all one hundred counties in North Carolina.

Mindful of the principle adopted in this circuit and most recently applied in Goodman v. Schlesinger, 584 F.2d 1325 (4th

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[4] In paragraph 5 of an amended complaint filed November 30, 1981, it is alleged that the plaintiffs are "black citizens of the United States and the State of North Carolina," but in paragraph 14 of the amended complaint it is alleged that "defendants have pursued and continue to pursue policies and practices that discriminate against black and Indian individuals with respect to their compensation, terms, conditions and privileges of employment," and class-type relief is sought on behalf of Indians as well as blacks. No Indian testified at the trial and no Indian has come forward to assert a claim in this action.

Cir. 1978), that certification of a class may await the completion of discovery, the court deferred final decision on the question of class certification pending completion of discovery. Meanwhile, pursuant to 42 U.S.C. § 2000h-2 the United States intervened in the action and thereafter the named plaintiffs and the government joined forces in the prosecution of the action.

Limited originally to allegations of violations of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, by order of October 9, 1979, the government's complaint in intervention was allowed to be amended to assert a cause of action under Title VII of the Civil Rights Act. As previously stated, on the eve of trial the named plaintiffs were allowed to file an amended complaint alleging violations of Title VII whereupon the

discrimination claims of both the named plaintiffs and the government became identical.

The order of October 9, 1979 also denied all motions to certify the action as a class action, and the motion of the named plaintiffs to reconsider this order was denied by order of July 29, 1981.[5] As recent as the final arguments herein following trial the named plaintiffs have continued to insist that the action be certified, and in their pre-trial brief

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[5] On June 3, 1975, the government had filed a motion to certify the action as a class action. It proposed five classes of blacks and Indians and a defendant class consisting of the then 477 county commissioners representing the one hundred counties in the state. Since the October 9, 1979 order the government has not pressed its class action claim further.

the named plaintiffs have proposed four classes of plaintiffs and one class of defendants as follows:[6]

> (1) All Black and Indian employees and potential employees of the NCAES since November 18, 1971, and thereafter;
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> (2) All Black and Indian persons who were recipients or potential recipients of service from the NCAES on November 18, 1971, and thereafter;
>
> (3) All Black and Indian members or potential members of the NCAES's 4-H Clubs on November 18, 1971, and thereafter;
>
> (4) All Black and Indian persons who were members or potential members of the NCAES's Homemaker Clubs on November 18, 1971, and thereafter; and
>
> (5) All County Commissioners in North Carolina, in their official capacities, on November 18, 1971, and thereafter.

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[6] Contrary to the statement in the brief that the proposed classes were set forth in plaintiffs' original complaint filed November 18, 1971, the word "Indian" appears for the first time in any pleading filed by the named plaintiffs in their amended complaint filed November 30, 1981, one week before the trial began.

In light of the evidence developed at trial and further case law developments since the order of October 9, 1979, the court remains of opinion that this is not a proper action for class certification either as to plaintiff or defendant classes. It is settled, of course, that employment discrimination cases are not entitled to class certification as a matter of course, but instead the requirements of Rule 23 must be satisfied as in all other type cases. East Texas Motor Freight v. Rodriquez, 431 U.S. 395 (1977); Kelley v. Norfolk and Western Railway Company, 584 F.2d 34 (4th Cir. 1978).

The plaintiffs apparently canvassed the entire state and were able to come up with fifty-five individuals, all black, who were willing to join in the suit as named plaintiffs. They apparently seek to

head a class consisting of "all black and Indian employees and potential employees of [the Extension Service] since November 18, 1971 and thereafter" who would present claims of discrimination in employment. There was no evidence at the trial that there exists any other potential class members who have been subjected to any alleged discriminatory employment practices of the defendants.

Five black farmers were named as plaintiffs, presumably to head a class of black people allegedly denied services or provided inferior services by the Extension Service solely because of their race, but none of these plaintiffs testified at the trial and there was no evidence whatever to support the allegations of the denial of services or the provision of inferior services by the Extension Service to anyone because of race.

Two black females, members of extension homemaker clubs, were named as plaintiffs presumably to head a class of black females allegedly denied membership in all white extension homemaker clubs and denied services or provided inferior services by the Extension Service solely because of their race. Neither of these plaintiffs testified at the trial, and there was no evidence whatever that any black female has at any time since the institution of this action been denied membership in any Extension Service homemaker club or has been denied services or provided inferior services by the Extension Service because of race.

The fathers of three black children who are members of 4-H clubs were named as plaintiffs, presumably to head a class of black children allegedly denied membership in all white 4-H clubs and denied services

or provided inferior services by the Extension Service solely because of their race. Neither of these plaintiffs nor their children testified at the trial. The only evidence of any discrimination toward a black child in 4-H club membership related to one isolated instance in which a voluntary worker attempted to discriminate against a black child, and this resulted in the prompt removal of the offending worker by the Extension Service. There was no evidence whatever that any other black child was ever denied membership in a 4-H club or was denied 4-H services or provided inferior services by the Extension Service.

What we are left with are the bare, conclusory allegations of the complaint to establish numerosity of affected parties, commonality of questions of law and fact and typicality of claims and defenses as

required by Rule 23(a). Numerous cases hold that this is not sufficient, one of the more recent of which is Wright v. Whitehall School District[7], 94 F.R.D. 80 (E.D. Ark. 1981).

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[7] The named plaintiffs and the government have been represented by exceptionally able counsel throughout this litigation, and the court does not reach the question of whether as representative parties these plaintiffs satisfy the requisites of Rule 23(a)(4) under the principles set forth in Rodriquez, supra, and Hill v. Western Electric Company, Inc., 596 F.2d 99 (4th Cir. 1979), cert. denied, 444 U.S. 929 (1979). It may be said, however, that in no event could these black plaintiffs represent a class including Indians in this action. Neither the original complaint nor the motion to amend the complaint (filed in open court on November 23, 1981) made any mention of Indians. The motion to amend simply asked leave to assert a cause of action under Title VII on behalf of seven named plaintiffs who had filed charges and obtained right-to-sue letters from the EEOC. Any further allegations of the amended complaint were not authorized by the order allowing the amendment.

Another line of cases supports denial of class certification here because of the multiple employing units involved (one hundred counties each providing funds and maintaining a voice in as well as the veto power over all employment decisions at the county level). Representative of these cases are Stastny v. Southern Bell Telephone and Telegraph Company, 628 F.2d 267 (4th Cir. 1980), and Doninger v. Specific Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977).[8]

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[8] Compare Penk v. Oregon State Board of Higher Education, 93 F.R.D. 45 (D. Ore. 1981) (geographic diversity of eight member units of the University of Oregon did not preclude class certification where it appeared that the state board generated policy decisions and guidelines for hiring in the entire system, the member units had no statutory autonomy to make employment decisions, and the board received a single budget appropriation and wrote all payroll checks).

In Stastny Judge Phillips, quoting from Harris v. Pan American World Airways, Inc., 74 F.R.D. 24 at page 41 (N.D. Cal. 1977), identified a key question to be considered in assessing the commonality criteria of Rule 23(a) in Title VII as follows:

> "How uniform or diverse are the relevant employment practices of the employer, considering matters such as: size of the work force; number of plants and installations involved; extent of diversity of employment conditions, occupations and work activities; degree of geographic dispersion of the employees and of intracompany employee transfers and interchanges; degree of decentralization of administration and supervision as opposed to the degree of local autonomy."

On the record presently before the court it clearly appears that the commonality requirement has not been satisfied.

Finally, and perhaps most importantly, we have here the unusual, if not

indeed unique situation in which the government exercised its authority under 32 U.S.C. § 2000h-2 to intervene in a private suit grounded on employment discrimination. Three years after the 1972 amendments to Title VII subjecting state agencies to its provisions the government sought and was granted leave to amend its complaint in intervention to allege a cause of action based on Title VII. As stated before, the named plaintiffs on the eve of trial obtained a similar amendment to their complaint. Thereafter the cases proceeded as one with the named plaintiffs and the government making common cause against the defendants. Thereupon for all intents and purposes the suit became a class action, for it is now settled law that class action certification is inappropriate and unnecessary in pattern and practice suits

brought by the EEOC and the government pursuant to Title VII. General Telephone Company v. EEOC, 446 U.S. 318 (1980). If the government prevails herein the relief granted can be as broad as any that could be granted in any private class action suit.[9] United States v. Masonry Contractors Association of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974); United States v. Georgia Power Company, 474 F.2d 906 (5th Cir. 1973).

For the foregoing reasons the court adheres to its previous rulings denying class certification for plaintiffs' classes in this action. What has been said with reference to the denial of class

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[9] Indeed the government has submitted a proposed decree which embodies almost every conceivable kind of injunctive relief including back pay, and if such decree were entered, the named plaintiffs as prevailing co-parties would appear to be entitled to attorney fees under 42 U.S.C. § 1988.

certification for the proposed plaintiffs' classes also suffices to justify denial of the proposed class of defendants consisting of all the county commissioners in the state.[10] There was simply no evidence of

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[10] In urging certification of defendants' class plaintiffs have taken a position seemingly contradictory to their position on the plaintiffs' class question. On the one hand they argue that the defendants' policies emanate from a central source and that these policies have a uniform discriminatory impact on the plaintiff class, while in an effort to obtain certification of a defendant class plaintiffs are obliged to argue that the counties and county commissioners have made it their statewide practice to discriminate against blacks in the areas of employment, working conditions and provision of services. It would seem apparent that if the practices complained of originate from a central core that the plaintiffs can obtain the relief desired without the certification of a defendant class. Any attempt to impose liability on the counties under a theory of vicarious liability as was done in Commonwealth of Pennslyvania v. Local 542, 469 F. Supp. 329, at pp. 411-413 (E.D. Pa. 1978), aff'd, 648 F.2d 923 (3rd Cir. 1981) would seem now to be foreclosed by the Supreme Court's reversal of those cases. General Building Contractors Association, Inc. v. Pennslyvania, ___ U.S. ___, 50 U.S.L.W. 4975, 4979-80 (June 29, 1982).

any standardized practice among the one hundred separate counties in the state to deprive anyone of any rights solely because of race. Prior to the merger of the two branches of the Extension Service there were forty-nine counties in which there were no black agents, and in many counties of the western part of the state the percentage of Negroes in the population is minuscule.

Case law supports this determination. United States v. State of South Carolina, 445 F.Supp. 1094 (D.D.C. 1977), summarily affirmed, 434 U.S. 1026 (1978) (plaintiff's attempt to certify a class of defendants consisting of ninety-two South Carolina school districts rejected); Greenhouse v. Greco, 617 F.2d 408 (5th Cir. 1980) (each church corporation within a diocese was legally autonomous subject

to bishop's authority only by virtue of religious obedience to canon law. Bishop had no legal power to carry out an integration decree of a federal court).

For these reasons the court adheres to its previous rulings denying certification of a defendants' class in this action.

THE LIABILITY ISSUES

As previously stated, the amended complaint filed by the named plaintiffs on November 30, 1981, and the government's amended complaint in intervention which was allowed to be filed by the order of October 9, 1979, contained essentially identical allegations of discrimination.[11]

[11] The government's motion for leave to file an amended complaint was filed on February 28, 1975. In addition to duplicating the charges made by the named plaintiffs in their original complaint the proposed amended complaint attached to the motion contained allegations of violations of Title VII on grounds of racial and sex discrimination. The order allowing the

It is alleged in each of the amended complaints that the defendants have implemented policies and practices of racial discrimination by

> (a) maintaining prior to 1965 a racially dual system of Extension Service employment and continuing to assign black ... employees only to counties which had black ... employees prior to 1965;

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filing of an amended complaint entered October 9, 1979, limited the allegations of discrimination to those based on race. So far as the court has been able to find in this bulky, ten-year-old record the government never filed an amended complaint, but the parties have proceeded as if such complaint had been filed, and the court has therefore accepted the government's proposed amended complaint as attached to its motion as its amended complaint but has disregarded the allegations charting sex discrimination as to which no evidence was offered at the trial.

While the government alleged discrimination against Indians in its amended complaint (but not in its original complaint in intervention) without objection on the part of defendants, no evidence was adduced at the trial relating to Indians, and the motion of defendants to dismiss the claims of all parties relating to discrimination against Indians will be allowed in a separate order.

(b) failing to recruit, hire, assign and promote blacks .. on a (sic) equal basis with whites;

(c) denying blacks .. the same compensation, terms, conditions and privileges of employment as provided to whites;

(d) segregating blacks ... in work assignments;

(e) failing or refusing to establish valid qualifications, tests, selection standards and procedure which are sufficiently objective to prevent continuing discrimination in hiring and promotion;

(f) failing or refusing to take appropriate action to correct the present effects of past racially discriminatory policies and practices;

(g) failing to provide minorities with services equal to those provided to white persons; failing to provide services to 4-H Clubs, Extension Homemaker Clubs, farmers and other persons on a non-racially segregated basis; and

(h) failing to maintain non-racially segregated 4-H Clubs and Extension Homemaker Clubs.

In addition to general denials the answers of defendants to the amended complaints pled the three-year statute of limitations, failure of the individual plaintiffs to file charges with EEOC within 180 days of the alleged discriminatory acts of defendants, good faith, waiver and the Eleventh Amendment.[12] The issue thus joined by the pleadings will be discussed in the sections of this memorandum to follow.

I. Discrimination in Work Assignments - Geographical.

The allegation that defendants assigned black employees only to those counties which had black employees prior to 1965 has not been supported by the evidence. Rather, the evidence shows that

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[12] A counterclaim of defendants against the United States Department of Agriculture has been dismissed by separate order.

blacks are employed wherever they apply for employment in those counties (mostly in western North Carolina) where the Negro population is very small and the relative number of black farmers and prospective recipients of services offered by the Extension Service is even smaller.

The defendants' motion to dismiss this claim will be allowed.

II. Failing to Recruit, Hire, Assign and Promote Blacks.

1. Recruiting.

The government contends that defendants "have not established an affirmative recruitment and hiring program nor agreed to such a plan with the United States Department of Agriculture which would eradicate their prior discriminatory employment practices." The defendants, of course, deny that there were any "prior discriminatory employment practices." The

evidence showed that the Extension Service recruits agriculture and home economics graduates by making personal visits to campuses within North Carolina and nearby states offering degree programs in agriculture and home economics and by sending position vacancy announcements to colleges offering degrees in these subjects.

Vacancy announcements are sent to some of the more prestigious out-of-state schools with nationally recognized agriculture and home economics programs such as the University of Wisconsin, Southern University in Louisiana and Tuskegee Institute in Alabama. With the exception of the latter two institutions the Extension Service has not recruited at other predominantly black institutions outside North Carolina, and the government contends that had applicants been sought

at nineteen additional schools in the southern region with substantial black enrollments the number of agriculture and home economics graduates available would have been doubled. The evidence showed, however, that the Extension Service has always received a sufficient number of applicants to keep its position filled, and since an employer is under no legal duty to recruit applicants for employment absent a finding of discrimination followed by court ordered affirmative action, the defendants' recruiting practices in this case cannot be held to have been discriminatory. Rather, the court was left with the impression that the Extension Service's recruiting practices were designed to obtain the highest qualified applicants.[13]

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[13] That the best laid plans for recruitment may not be productive was illustrated by the experience Dr. Chester D. Black, the

The recruitment procedures employed by the Extension Service are set forth in more detail in defendants' proposed findings of fact 92(a) - 97 inclusive which the court adopts as its own and incorporates herein by reference.

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present Director of the Extension Service, had when he visited Tuskegee Institute in Alabama. Although he had written the institution to inform them that he was coming and that he wanted to interview potential applicants for positions in agriculture, the only person who showed up for interview was one with a master's degree in sociology "who expressed an interest in the possibility of working with extension work." Dr. Black stated that he was never able to hire anyone from Tuskegee, and he went on to testify that "I was awed by -- unless you have been through it and saw the recruitment effects put on by major companies -- the Ford Motor Company at the time I was there had a display that you would use at a State Fair to attract people to their company, and I was recruiting at a real disadvantage that day." Tr. 4493-5.

2. Hiring.

Hiring procedures of the Extension Service for positions at the state level differ from the procedures employed in filling county level positions. This is because state level positions require faculty appointment in the School of Agriculture and Life Science at North Carolina State University and are therefore subject to the selection and promotion criteria utilized by the University for filing vacancies on its faculty.

State level positions in the Extension Service generally require a minimum of a master's degree, and the majority require a PhD degree either in agriculture and home economics. Because of the very small number of blacks who obtain master's and Ph.D degrees in agriculture and home economics every year the labor pool from which the Extension Service can recruit

for positions at the state level is sharply limited. This alone is sufficient to account for the seemingly small percentage of blacks who hold state level positions in the Extension Service.

The selection procedures employed by the Extension Service in filling state level positions are set forth in more detail in defendants' proposed findings of fact Nos. 214-237 inclusive which the court adopts as its own and incorporates herein by reference. These procedures are non-discriminatory and have been employed in a non-discriminatory manner.

All applicants for entry level positions in the counties must have a bachelor's degree in an area related to the program responsibility to be assigned the agent, and a master's degree is highly desirable. Filling positions at the county professional staff level also

involves a consideration of the agricultural, social and economic needs of the particular county, and this in turn dictates the number of potential applicants who can qualify for a particular position.

When a vacancy in a county level position comes open or a new position is created, it is established for a particular subject matter responsibility. Prior to 1972 there were not a great many alternative employment opportunities for agriculture graduates, and consequently the turnover rate for county level employees was much smaller than it has been in recent years which have seen an increase in the number of large farms with an accompanying increase in employment opportunities for agriculture agents. Because of this small turnover rate it was felt that word-of-mouth notices of

vacancies and announcements in the Extension Service newsletter mailed monthly to all employees in the organization sufficed as adequate notice of employment vacancies. Since 1972 the Extension Service has sent monthly vacancy announcements to all offices within the state and to the educational institutions indicating the location, position and subject matter areas of responsibility required to fill the vacancy.

No evidence has been offered to show even one qualified black applicant who applied and was not accepted for employment in a county level position with the Extension Service. EEOC v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980); Shack v. Southworth, 521 F.2d 51, 55 (6th Cir. 1975); Eastland v. Freeman, 528 F. Supp. 862, 881 (N.D. Ala. 1981). It is perhaps significant also to note

that there is no allegation nor proof in this record that the Extension Service has ever discharged any employee on account of race.

The hiring procedures employed by the Extension Service in filling county level positions are set forth in more detail in defendants' proposed findings of fact Nos. 88-92 inclusive; and 98-102 inclusive which the court adopts as its own and incorporates herein by reference. These procedures are non-discriminatory and have been employed in a non-discriminatory manner which is further attested by the fact that historically the Extension Service has employed more black professionals that any state except Alabama, where the percentage of total population that is black is also higher. As of November, 1981, the Extension Service employed a total of 1,554 full and

part-time people. The figures include professionals at both the state and county level as well as all the para-professionals and other supporting staff. Of this total, 444 or 21.4 per cent were black. The latest census data shows that blacks represent 22.4 per cent of the state's total population. Given the difficulties of recruiting and retaining qualified blacks, it is apparent that the Extension Service has done a commendable job in its minority hiring program.[14]

3. Assignments

There is some evidence that following the merger of the white and black branches of the Extension Service in 1965

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[14] More detailed facts concerning the difficulties of recruiting and retaining qualified blacks are set forth in defendants' proposed findings of fact Nos. 250-254 inclusive which the court adopts as its own and incorporates herein by reference.

blacks, who had previously worked "across the board" in all subject matter areas of responsibility, were assigned to more limited areas of responsibility and that whites were assigned responsibility for higher revenue-producing crops in some instances.[15] In each instance defendants were able to establish a sound reason for the action taken and that the white agent given the assignment was equally or better qualified than the black agent who did not get it. Plaintiffs were unable to show that the reasons assigned for the action

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[15] There was other evidence from which it appeared that the contrary was true. For instance, the commodities involved in the areas for which the plaintiff, P. E. Bazemore, had responsibility in Union County before he retired in 1980 were marketed for over ten million dollars which represented some thirty to forty per cent (defendants claims over fifty per cent) of the total dollar volume of all the crops and livestock sold in the county that year - far more than any other agent, black or white. Tr. pp. 576-579.

taken were pretextual, and the court is unable to find from a preponderance of the evidence that the Extension Service has discriminated against blacks in the area of job assignments.[16]

4. Promotions.

(i) County Level Agents.

At the county extension professional level there are three agent titles, assistant agent, which is the entry level, associate agent and full agent. The requirements for promotion from one rank,

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[16] If it is true, as the government contends, that blacks continued to be "under represented" in some major commodities, it may well be simply another reflection of the fact that agricultural agents continue to be in short supply. See defendants' proposed finding of fact No. 250 adopted by the court wherein it is said: "Blacks are particularly under represented among graduates in the field of agriculture. Successful recruitment and retention of blacks in agriculture is made more difficult by the fact that black agricultural graduates do not remain in the field.

to the next above have been in effect for twenty years and have been well publicized. These include service of time in rank before an agent can become eligible for promotion to the next higher rank, but agents who possess or earn a master's degree or a doctorate degree are given additional time credit which enables them to shorten the time required to be spent in a particular rank. A credit of one year is given for the master's degree and two years for the doctorate.

Upon satisfaction of the time requirements for promotion the agents is informed of his or her eligibility for promotion the procedures for which are uniform throughout the Extension Service. First, the district extension chairman is notified annually by the assistant director for county operations of the agents in each district who are eligible

for promotion consideration based on time in grade. The district chairman notifies the agent at the county level of his or her eligibility and provides the agent with a promotion form which requires the agent to give his or her performance, accomplishments, educational background and tenure. The agent then makes application for promotion by preparing and delivering the form to the county extension chairman who reviews the application and sends it along to the district chairman with his recommendations for or against the promotion.

Upon receipt of the application the district chairman confers with the district program leaders and obtains their observations and information pertaining to the performance of the agent with respect to his or her areas of subject matter responsibilities and extension educational

programs which they have been carrying out. On the basis of the information obtained from all sources including that obtained by him personally as a result of participation in the agent's annual performance review with the county chairman biannually and his personal observation of the agent's work from time to time the district extension chairman makes a recommendation as to promotion to the director's office at the state level where the application is reviewed by the director, associate director and assistant director for county operations who either approve or disapprove the promotion.

The promotion procedures employed by the Extension Service are set forth in more detail in defendants' proposed findings of fact Nos. 160-170 inclusive which the court adopts as its own and incorporates herein by reference.

Notwithstanding it has offered no evidence of non-compliance by the Extension Service with its promotion procedures the government contends that black agents at the county level have not received title promotions as rapidly as whites, and to prove the charge it has cited the cases of four black agents who applied for and did not immediately receive promotions. A review of al the evidence surrounding the failure of these four individuals go gain promotions initially has failed to convince the court that such failures were attributable to racial discrimination.

Jonnie Jones, a named plaintiff and a black, an admittedly competent agent, testified at the trial. He came across as an abrasive, argumentative and belligerent witness, but the court can only speculate as to whether these personality traits played any part in the denial of his

initial request for a promotion to the position of full agent. What does appear is that the request was reviewed by Dr. Paul Dew, the district chairman at the time, and all others required by the promotion procedure to be involved, and the decision was that Jones did not satisfy the established requirements for promotion at that time. There is not the slightest evidence that race had anything at all to do with the decision. Thereafter Jones accepted a position in Lenoir County where he obtained promotion to the position of full agent.

Haywood Harrell, a named plaintiff and a black, testified at the trial, and he was also an abrasive and belligerent witness. He identified several areas of dissatisfaction with the Extension Service, but its failure to promote him was not one of them. In fact he did not

testify that he ever applied for a promotion, and if he did not, this alone would eliminate any claim on his behalf based on a failure to promote him. It further appears, however, that Harrell was a very poor student when he was in school at A & T, his grades consisting mostly of "D's", and that although he was engaged primarily in 4-H work and was well aware of Extension Service policy that required 4-H Clubs to be open to all races, he has continued to organize all black clubs nor did he ever bother to instruct the volunteer leaders of the clubs that they were to be open to all races. There was no evidence that his failure to gain a promotion was in any way attributable to race, and on the contrary there is the unmistakable inference that he simply was not qualified for promotion.

Wanda Wilkins, a black but not a named plaintiff, testified at the trial that after she had been an assistant agent with the Extension Service for three years she applied for promotion to the position of associate agent but was turned down for the stated reasons that she had not performed satisfactorily in her 4-H programs and was "too concerned about getting married and going to graduate school." The government has compared her case with that of a white women with about the same tenure who was also engaged to be married and who was recommended for promotion at that time. The relative qualifications of the two agents were not shown by the evidence. Not satisfied with her rejection, Wilkins appealed to the associate director of the Extension Service who convened a review panel consisting of the district chairman, the

county chairman and the two district program leaders to inquire into the matter and report back to him. They also recommended that the promotion be denied because of "low participation and a weak program in 4-H," but they agreed to work with Ms. Wilkins "to improve the productivity of her program." She accepted this finding, her performance did improve and she was thereafter promoted.

Margaret Woods, a black non-plaintiff, was called as a witness by the named plaintiffs to show that the Extension Service had authority to transfer its agents between counties. By examination of this witness the government sought to show that she had been wrongfully denied a promotion. While an assistant agent in Gates County in 1977 Ms. Woods filed an EEOC charge which resulted in a hearing before a panel convened by the defendant.

The matter was settled and she was transferred to Randolph County where she applied for a promotion to the position of associate agent in 1980. This was denied, and in 1981 she transferred to Warren County where she again requested a promotion. She was then told by the district chairman that if she made satisfactory progress he would recommend her promotion on December 1, 1981. A meeting between the district chairman and Ms. Woods scheduled for November, 1981, did not take place, but on the basis of reports from his associates on the good progress Ms. Woods had made following her transfer to Warren County the district chairman did recommend her promotion and it was granted effective January 1, 1982.

The procedures including the performance evaluation system utilized in connection with promotions by the Exten-

sion Service of county level professionals are valid, proper and non-discriminatory, and they have been employed in a non-discriminatory manner.

(ii) County Extension Chairmen

The top administrative position in the Extension Service at the county level is that of county extension chairman. In addition to administrative and leadership responsibilities the chairman normally carries a subject matter program workload depending on the particular needs of the county. While the position is routinely filled from the ranks of county level professionals, it is one that has to be applied for and it is not considered by the Extension Service to be in the promotional line within the county. Rather, it is open to all qualified applicants from any county or state. A

major portion of the battle here has been waged around the claims of the named plaintiffs and the government that the Extension Service discriminates against blacks in filling these positions.

Beginning in 1972, the year the Title VII amendments bringing state agencies into its cover became effective, the Extension Service began publishing announcements of vacancies in the positions of county chairmen which announcements contain the name of the county in which a vacancy exists, the subject areas of responsibility which the county chairman must carry in addition to his or her administrative duties and the educational and experience qualifications required. All applicants must have at least a bachelor's degree, and a master's degree is desirable but not mandatory. Six years (formerly seven) of service with the

Extension Service or equivalent experience is required, at least two years of which must have been in the service of the North Carolina Extension Service. A master's degree will count for one year of experience and a doctorate two years.

All applicants who meet these qualifications are interviewed.[17] The most important factors considered in the interview process are subject matter ex-pertise required in the county, demonstrated leadership in present and previous positions, demonstrated administrative and management capabilities, educational background, advanced training, human relations and communications skills. Interview are

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[17] These minimum requirements have not been rigidly adhered to in every single instance, but where there has been a variance defendants have shown a valid reason for recommending the applicant in question for appointment as county chairman.

conducted separately by the district chairman, the assistant director for county operations, the associate director and the director of the Extension Service. The group then meets and discusses the strengths and weaknesses of all applicants and comes to a consensus as to whom they will recommend to the board of county commissioners of the county where the vacancy exists.

Occasionally more than one applicant will be presented to the board of county commissioners for interview and selection. It will be recalled that in the memorandum of understanding between the Extension Service and the boards of county commissioners all appointments are worked out jointly between the Extension Service and the commissioners and no official action can be taken unilaterally by either party with respect to filling a vacancy.

Accordingly, county commissioners have on occasion rejected an applicant recommended by the Extension Service, and some of these have been black. In more instances, however, white applicants have been rejected.

Since the institution of statewide announcements of vacancies in 1972 there have been seventy-seven county extension chairmanship position vacancies in the state. No blacks applied for fifty-nine of these vacancies, but eighteen individual blacks did apply for the remaining eighteen vacancies. Of the eighteen vacancies for which blacks applied five were selected as county chairman. Although highly recommended by the Extension Service another black, I. W. Murfree, was rejected by the Board of Commissioners of Granville County.

Thirty-seven individual whites applied for the eighteen vacancies for which the eighteen individual blacks also applied, and thirteen of the thirty-seven white applicants were selected as county extension chairmen.

It thus appears that of the thirty-seven individual white applicants thirty-five per cent were selected and that of the eighteen black applicants twenty-eight per cent were selected. A comparison of the white selection percentage with the black selection percentage shows that the black selection rate was eighty per cent of the white selection rate. This is exactly the rate established in the Uniform Guidelines on Employee Selection Procedures as a rule of thumb for deter-

mining whether employer policies or practice have an adverse impact on employment opportunities.[18]

Moreover, had the black applicant, Mr. Murfree, been accepted by then Commissioners of Granville County the number of successful black applicants would have been six out of eighteen, and the percentage of those applying would have been raised to thirty-three and one-third per cent. At the same time the number of successful white applicants would have been reduced by one of the

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[18] Section 4D, 43 Fed. Reg. 38,297 (1978), provides:

> "A selection rate for any race *** which is less than four-fifths (4/5) (or eighty per cent) of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by federal enforcement agencies as evidence of adverse impact.

percentage of successful white applicants would have dropped to thirty-two per cent.[19]

On the basis of the foregoing evidence the court is unable to find that the plaintiffs have established a prima facie case of discrimination in the selection of county chairmen. The result would be

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[19] Despite the suggestion in cases such as Brown v. Gaston County Dyeing Machine Company, 457 F.2d 1377, 1384 (4th Cir. 1972), and more recently given currency in EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981)(rehearing en banc denied by equally divided court, ___ F.2d ___, May 18, 1982), that the use of small samples such as those involved here may somehow be justified in order to compensate for the difficulty encountered by plaintiffs in proving discriminatory motive in these cases, these figures probably serve only to point up the inherent unreliability of such evidence as proof of inferences favorable to either side. Other courts have rejected such evidence as "meaningless." Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974). See also EEOC v. United Virginia Bank, 615 F.2d 147, 153 (4th Cir. 1980); Allen v. Prince George's County, 538 F. Supp. 833 (D. Md. 1982).

otherwise if only the government's statistics were considered at face value. The government contends that it has offered evidence tending to show that if black agents had been appointed to county chairman positions at a rate proportional to their 1964 representation in defendants' county professional work force, they would have received thirty-one county chairman appointments from 1962 through November, 1972; that only one black chairman was actually appointed during this period; and that the disparity in the rate of promotions was 5.98 standard deviations. Government's Proposed Finding No. 95. The government further contends that it has offered evidence tending to show that from 1962 until May, 1981, five blacks and 227 whites were appointed to county chairman positions; that from 1974 to 1981 the average

representation of blacks among full agents was 22.4 per cent; that if black agents had been appointed to county chairman positions at a rate proportional to their representation as full agents, they would have received fifty-two county chairman appointments from 1962 until May, 1981; and that the disparity in the rate of promotions was 7.40 standard deviations. Government's Proposed Finding No. 127 and GX 124.1. Standing alone these statistics would certainly create a prima facie case of discrimination.

> There can be no doubt that standard deviations of this magnitude demonstrated that the low proportions of women in the technical and managerial categories were not the result of chance. But it was a quantum leap, under circumstances of this case, to jump from that proposition to the conclusion that such high standard deviations proved - or even had any tendency to prove - that defen-dants had committed a legally cognizable wrong. Far from being conclusive against

> defendants, plaintiff's statistical evidence and the EEOC reports on which it was based were totally wanting in probative value.

Ste. Marie v. Eastern Railroad Association, 650 F.2d 395, 400 (2d Cir. 1981).

Such is the case here where closer examination reveals that the government's statistics are fatally flawed.

> If the prima facie case is established by the EEOC's statistical evidence, the employer may nevertheless rebut it, dispelling the inference of a general policy of discrimination, by "demonstrating that the Government's proof is either inaccurate or insignificant." Teamsters, 431 U.S. at 360. ... One way that static work force statistics revealing gross disparities can be shown nevertheless to be "insignificant" is by showing that the disparities are mainly attributable to pre-Act rather than to post-Act employment actions. This may be done in two basic ways: by focusing on the static work force statistics and purging them of all pre-Act employment actions so that only post-Act actions remain for assessment; or, more commonly,

> by focusing on post-Act employment decisions, and showing either than considered alone, they affirmatively reveal nondiscrimination in the post-Act period or that they are insufficient in number to support an ultimate conclusion of a post-Act discriminatory pattern or practice. Hazelwood, 433 U.S. at 309, 313. ...

EEOC v. American National Bank, 652 F.2d 1176, 1188 (4th Cir. 1981).

The position of county chairman was created in 1962-63 before the merger of the two branches of the Extension Service, and the first one hundred appointees were white. Not until 1971 was the first black county chairman appointed. At the time of trial a total of 232 county chairmen had been appointed, only five of whom were black. As previously shown, however, there have been only seventy-seven vacancies since 1972 when Title VII was made applicable to public employers, and

blacks have applied for only eighteen of these.[20] The appointment rate for blacks during this period has been within the applicable EEOC Guidelines, and the court must reject the government's attempt to have pre-Title employment decisions considered in this instance. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 (1977) ; United Airlines v. Evans, 431 U.S. 553 (1977);

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[20] The possibility of liability for pre-Title VII discrimination under 42 U.S.C. §§ 1981 and 1983 has been considered, but any such claims arising prior to November 18, 1968 would be barred by the statute of limitations, and in any event proof of the intentional discrimination necessary to sustain an action under these statutes (even if the case is considered as one of disparate impact as the government would have the court do) has not been established. General Building contractors Association v. Pennslyvania, ___ U.S. ___, 50 U.S.L.W. 4975 (June 29, 1982). The named plaintiffs have conceded in their brief that proof of discriminatory purpose is required to prove a prima facie case of discrimination under 42 U.S.C. §§ 1981 and 1983. Plaintiffs' Brief filed February 8, 1982, at p. 5.

Ste. Marie v. Eastern Railroad Association, 650 F.2d 395, 401 (2d Cir. 1981); EEOC v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980); EEOC v.Local 14, 553 F.2d 251 (2d Cir. 1977).

> Thus, in order to be valid, a statiscal analysis such as the one presented here must exclude those persons hired prior to [March 24, 1972, the effective date of Title VII for public employers]. To include pre-Act hires in the statiscal analysis in this case would improperly weight the evidence and would tend to show present discrimination by an employer if it had discriminated prior to the effective date of the Act but had not discriminated after the Act took effect.

EEOC v. United Virginia Bank, supra, at 150.

Plaintiffs' statistics are flawed in a further respect in that they include the assumption that every black full agent at the county level was qualified to fill the position of county chairman. There was an

utter lack of any proof to substantiate such a claim, and the persistent efforts of defendants through discovery and all the way through the trial to require plaintiffs to identify the qualified labor pool from which this position should be filled met with no success.[21] While it is true that most vacancies have been filled

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[21] Evidence of the named plaintiffs that they were qualified for the position of county chairman consisted principally of their own self-serving and conclusory testimony. Courts uniformly reject such testimony as insufficient to establish qualifications. Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980).

> Smith, of course, testified that he had versatility, and that his competence as an analyst was not confined to the field of logistics. Smith's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant.

Id. at 1067. See also Lovelace v. Sherwin-Williams Company, ___ F.2d ___ (No. 80-179, 4th Cir., June 15, 1982), Slip Opinion at 31.

from within the ranks of the county professionals, it is equally true that the position of county chairman requires special administrative and leadership skills not shared generally by all such employees, and

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

Hazelwood School District v. United States, 433 U.S. 299, 308 n.13 (1977). See also United States v. Commonwealth of Virginia, 620 F.2d 1018, 1025 (4th Cir. 1980), and EEOC v. Radiator Specialty Company, 610 F.2d 178, 185 (4th Cir. 1979).

The plaintiffs have complained that defendants employ subjective criteria in selecting applicants to be recommended for

appointments as county chairman, and this is true to some extent. However, the Extension Service after considerable study and effort developed and put into effect in 1972 a "Performance Review Guide" for the purpose of evaluating the performance of its employees.[22] The performance of each agent in the Extension Service is evaluated annually. Both the agent and the chairman participate in this process, and the district chairman participates in it bi-annually. The persons involved in the process attempt to reach a consensus on the evaluation of the agent's performance,

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[22] The development of the Extension Service's performance evaluation system is traced in defendants' proposed findings of fact Nos. 104-144 inclusive to which plaintiffs have interposed no serious objections, and as background information the court adopts these findings as its own. Significantly, the plaintiffs produced no evidence to show that the Extension Service's performance evaluation system is invalid or improperly validated.

and when the Performance Review Guide is completed and signed it is filed with the district chairman and thereafter used in matters affecting the agent's performance when such matters as promotions and merit salary raises are under consideration.

The fact that several persons including the agent himself participate in the evaluation and promotion processes minimizes the possibility that bias or prejudice on the part of any one individual will affect decision.[23] Valentino v. United States Postal Service, 511 F. Supp. 197, 933 (D.D.C. 1981), aff'd, 674 F.2d 56

[23] At least four of the highest ranking officials in the Extension Service participate in the county chairman selection process. These officials, each of whom holds a doctorate degree from a leading university, testified at the trial. They came across as fair-minded, exceptionally capable professionals and the court credits their testimony in which they disavowed any racial bias or prejudice in the performance of their duties, particularly with respect to promotions.

(D.C. Cir. 1982). Moreover, in the white collar employment context courts have tended in recent years to become more tolerant of subjectivity in employment decisions. Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981); Presseisen v. Swarthmore College, 442 F. Supp. 593 (E.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978). When subjective criteria are used fairly and with procedural safeguards they have been approved by the courts and EEOC. Thompson v. McDonnell Douglas Corporation, 416 F. Supp. 972, 982 (E.D. Mo. 1976). The use of subjective criteria is certainly not unlawful per se, for hiring and promotion decisions in supervisory and managerial positions cannot realistically be made using objective standards alone. Rogers v. International Paper Company, 510 F.2d 1340, 1345 (8th Cir. 1975), vacated on

other grounds, 432 U.S. 809 (1975). At these levels the test of legality of white collar employment practices is not whether they are subjective, as inevitably they are, but whether they are applied fairly. See Waintroob, The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level, 21 Wm. & Mary L. Rev. 45, 48-62 (1979). The plaintiffs next assert what has come to be known as "futility claims" - claims of blacks who contend they did not apply for the position of county chairman because they felt that blacks were being discriminated against and that it would be futile to do so. The court has again reviewed the testimony of the five black agents relied upon to establish such claims, James Wright, Slater Lloyd, William Wright, Leroy James, named plaintiffs, and Helen Payne, a non-plaintiff. As a result the

court remains of the opinion formed at the time of trial that the reasons given by these witnesses for not applying for county chairmanships were not credible.[24]

James Wright, a black agricultural extension agent in Hertford County, testified that when the position of county chairman opened in the late 1960's in that county he did not apply for it because he thought it was futile to do so. When another vacancy in the county chairman's position came open in Hertford County in 1979 Wright was recommended for the position by the Extension Service and did

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[24] A non-applicant's burden of proving that he would have applied for a position except for the perceived employer's discriminatory practices is not an easy one. Resolution of such claims not only requires proof that the claimant would have applied but for discrimination but also that he was qualified and yet would have been discriminatorily rejected had he applied. Teamsters, supra, 431 U.S. at 368.

in fact apply for it. He was rejected by the Board of Commissioners of Hertford County in favor of a white person. Since the trial that person has resigned, James Wright has re-applied for the position, has been appointed and is now serving as county chairman of Hertford County.[25]

Slater Lloyd simply testified that he did not apply for the position of county chairman in Granville County in 1971 because he "didn't think they would appoint a Negro as county chairman at that time."

William Wright testified that he did not apply for the position of county chairman in Nash County about 1971 because

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[25] This information has been furnished the court pursuant to the court's directive at the close of the trial that it be kept informed of vacancies in county chairmanships and actions taken to fill them. Wright, incidentally, was selected over two other applicants for the position, one white and one black.

he was not aware that there was a vacancy until it had already been filled. Since Wright was working everyday in the same office with the county chairman who resigned, this evidence was simply incredible.

Leroy James testified that he did not apply for a county chairmanship in 1965 because "I had the feeling I wasn't going to get the job, so I didn't apply."

Q. Why did you have that feeling?

A. Well I felt that the people from the state level - I was not going to be able to reach them. And I felt maybe on the county level I hadn't reached the clientele from that point of view. So that is the reason I didn't apply.

Q. Was there any contact or conversation that you had had with the administration that gave you that feeling?

A. Not really.

Tr. Vol. 11, pp. 2510-11. James was recommended by the Extension Service for the county chairmanship of Johnston County in 1976, but was not selected. In 1978 he was recommended for the county chairmanship of his home county of Pitt and was appointed and is now serving in that position.[26]

Helen Payne testified that she did not apply for the position of county chairman in Caswell County in 1974 because "I felt like it was a waste of time and to avoid embarrassment .... I didn't know of any other woman - black home agent - in the state that was a county chairman." In 1974 Payne already had in more than thirty years of service with the Extension Service and was eligible for retirement.

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[26] The individual claims of the four named plaintiffs who gave futility claim testimony will be treated more fully in a later memorandum.

She did in fact retire a few years thereafter. The does does not credit any inference which may arise from the testimony of this witness that she would have applied but for discrimination, but in any event there was no evidence from which the court could find that she was qualified for the position and that she would have been discriminatorily rejected had she applied.

It thus appears that of the five witnesses on whose testimony the plaintiffs rely to establish "futility claims" only one, Helen Payne, testified concerning a vacancy which occurred after Title VII became applicable to public employers in 1972. It was the court's impression that this one witness was clearly not qualified for the position of county chairman; that it never crossed her mind to apply for the position in 1974; and that if she had

applied, she would have been rejected but not for any discriminatory reason. Of the other four witnesses two of them did apply for vacancies after the Extension Service to the county commissioners of the two counties in which their applications were made and eventually each of them was appointed and is now service as a county chairman.

Further proof of the lack of merit in the "futility claims" of the blacks who did not apply for county chairmanships lies in the fact that many blacks did apply for these positions after 1972, and when they did they were appointed in approximately the same ratio as were the white applicants for the same positions. The court rejects all futility-based claims of discrimination.

In sum, the court finds that the statistical evidence fails to establish a prima facie case of racial discrimination by the Extension Service in filling county chairmanship vacancies, but in any event the defendants have effectively rebutted plaintiffs' case by showing the inaccuracy and insignificance of plaintiffs' proof. This has been done by showing that apparent disparities in plaintiffs' static work force statistics are mainly attributable to pre-Act rather than post-Act employment actions; that they are based on the erroneous assumption that the qualified labor pool consists of every black professional at the county agent level in the state; that all black professionals are available for assignment to any county in the state; that defendants' post-Act decisions which to some extent are based on subjective criteria reveal non-dis-

crimination in the post-Act period; and that defendants have adopted proper and valid procedures for promotions to the position of county chairman which plaintiffs have not questioned. These procedures having been fairly and uniformly followed without bias or prejudice, the claims of plaintiffs based on alleged racial discrimination by the Extension Service in the selection of county chairman must fail.

(iii) State Level Positions.

The positions in the Extension Service other than those at the county level are known as state level positions. These include the director, associate and assistant director, specialists, program leaders and district extension chairman. The duties of these various offices have been more fully described in the background section of this memorandum.

Traditionally most, but not all, of these positions have been held by whites.

State level positions, with few exceptions, require a minimum of a master's degree, and the majority of them require a PhD either in agriculture or home economics.[27] Since all state level positions are also faculty appointments within the School of Agriculture and Life Science at NCSU these positions are subject to the selection and promotion criteria utilized for recruitment and promotion of faculty at the university level. Selection and promotion of state level personnel in the Extension Service therefore differs from the selection and promotion procedures utilized for county

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[27] The minimum degree requirements for the various state level positions are set forth in defendants' propoosed findings of fact Nos. 219-225 inclusive which the court adopts as its own and incorporates by reference.

level positions.

Where, as here, the need for special qualifications for state level positions is manifest it is incumbent upon a plaintiff alleging discrimination to produce "specially qualified market statistics" in order to show disparities. Hazelwood School District v. United States, 433 U.S. 299, 308 (1976); EEOC v. Radiator Specialty Company, 610 F.2d 178, 185 (4th Cir. 1979). But here again the plaintiffs have failed to show the number of qualified and available blacks in the labor pool or relevant labor market from which defendants could fill these state level positions. Defendants, on the other hand, have shown that the labor pool from which defendants recruit is sharply limited for that

> ... blacks are greatly underrepresented among the graduates with master's or PhD's in agriculture and home economics. For the academic years 1975-76, 1976-77 and 1977-78 blacks represented from only 1.4% to 2.4% of the total recipients of master's degrees and from 1.2% to 2.1% of the PhD's in agriculture and natural resources in the United States. A total of only 43 blacks received PhD's in agriculture in the United States during these three years. None were awarded in North Carolina. In the field of home economics, for the above three years, blacks received from 4.7% to 5.1% of the total number of master's degrees awarded in the U.S. and from 8.6% to 11.9% of the PhD's. However, only a total of 20 PhD's were awarded in home economics to blacks during this entire three-year period, with only one awarded in North Carolina. In North Carolina the percentage of blacks receiving master's degrees in home economics ranged from 8.6% to 11.9% of the total master's degrees awarded in this field for the period 1975-78.

Defendants' Proposed Finding of Fact. No. 216.

In addition to their failure to show the number of qualified and available blacks in the relevant labor market the

plaintiffs have failed to produce any evidence as to how many qualified blacks have applied but have not been accepted for employment by the Extension Service in a state level position.

The procedures employed by the university and the Extension Service to fill state level positions are designed to obtain the best qualified persons and at the same time to comply with all employment discrimination laws. The employment and selection system is governed by the university's affirmative action officer, Dr. Lawrence M. Clark, who is black. A search committee is then formed which makes a nationwide search for interested and qualified persons. Position announcements are sent to all 1862 and 1890 land grant institutions and also to nationally-based journals in the subject area in the particular vacancy. After interviews with

interested applicants have been conducted decision is made to offer the position to the candidate thought to be best qualified, but before he or she is offered employment, the approval of the university affirmative action officer is obtained.[28]

The admittedly valid procedures employed by defendants in filling state level positions having been fairly and uniformly followed, in the absence of any evidence tending to show bias or prejudice in their implementation, it follows that plaintiffs have failed to establish a prima facie case of discrimination in filling these positions.

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[28] These procedures are set forth in more detail in defendants' proposed findings of fact Nos. 229-237 inclusive to which plaintiffs have not objected, and the court adopts them as its own and incorporates them herein by reference.

III. Salaries.

In the language of Title VII the plaintiffs have alleged that the Extension Service had denied blacks "the same compensation, terms, conditions and privileges of employment as provided to whites," but the plaintiffs' evidence has concentrated only on alleged discrepancies in salaries between blacks and whites. The establishment of this claim continues to be a primary goal of both the named plaintiffs and the government. With respect to "terms," other than salaries, "conditions" and "privileges" of employment, suffice it to say that such meager evidence was was offered either failed to establish a prima facie case or was conclusively rebutted by defendants,[29] and

[29] For example, in an apparent effort to show discrimination in providing office facilities, Geraldine Ray, a black named plaintiff, testified that she felt "stigmatized" because she was provided

the court will therefore limit its discussion to the matter of the alleged

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with an old desk and that when new carpeting was installed it did not cover all the offices but stopped "right at her door." Tr. p. 2325. Defendants' witness, Worth Gurkin, explained that his request to the county commissioners to include in his budget enough money to carpet all the offices was cut in half and therefore only one-half the offices were carpeted that year; that the office of another black agent was carpeted but his own office and Ray's were not; and that the desk complained of was a good solid wood desk which, although it could have used some sanding and a coat of varnish, is still in use ten years later. Tr. p. 6332-39. The claim was patently frivolous.

The original complaint alleged that blacks were denied the same quality and quantity of "in service training" as whites. There was some evidence concerning in service training but it tended to show that opportunities afforded blacks in this respect equaled or exceeded those afforded whites. Significantly, plaintiffs have not submitted proposed findings of fact on this and other subjects related to "conditions and privileges" of employment and with respect to the defendants' proposed findings (207-210 inclusive) plaintiffs have simply responed under the "red, blue, yellow" system of marking opposing parties' proposed findings used in this case that the findings are not denied but are irrelevant.

discriminatory pay practices of the defendants.

The Extension Service has established a minimum entry level salary for all new professional employees at the county level who hold a bachelor's degree and have no prior experience. A salary differential is paid those having a master's degree at the time of employment. On occasion it has been necessary to pay more than the entry level salary in order to employ persons to fill positions requiring special skills. Exceptions are also made in the case of new employees whose prior experience in teaching or business has better equipped them to assume responsibilities of their positions more quickly.

Because of inflation starting salaries have increased rapidly in recent years, and this in turn has made it necessary to adjust the salaries of those

already employed in order to maintain a proper relationship between the salaries of beginners an those who have acquired some tenure. In order to make such adjustments is is sometimes necessary to use funds intended for normal merit salary increases.

As previously stated, funds for the payment of salaries derive from three sources, the counties, the state and the federal government. The financial ability of counties to support the local extension program and the salaries of its agents varies considerably between the lower income counties and higher income counties and between the counties in the western, Piedmont and eastern sections of the state. The percentage of total salaries of county extension employees that is contributed by the counties varies from

county to county, ranging from a high of 57% in Forsyth County to 18% in Camden County.

From time to time a given county may grant across-the-board pay increases to its employees which may also be in the form of a specified percentage of the county portion of the salary or a designated amount for each employee. Some counties may not grant such increases at the same time. There is no fixed procedure between the counties for the granting of pay increases among counties.

Each year about ten of the counties also make available to the Extension Service funds to provide merit salary increases. In some cases these increases are designated by the county commissioners as to the amount and which agents shall receive them. In other cases the county extension chairman will make these merit

increase decisions based on job performance of the agent for the previous twelve months.[30] The evaluation of the agent's performance forms the basis for determination of his eligibility for a merit salary increase and the size of that increase, if any.

Funds furnished by the state to pay salary increases are usually provided on a percentage or flat sum basis across the board to all University employees which include employees of the Extension Service. There is no evidence that such salary increases have not been granted by the Extension Service in accordance with the state's authorization and without

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[30] The job performance evaluation system used by the Extension Service is described in detail in defendants' proposed findings of fact Nos. 104-144 inclusive previously adopted by the Court. See Footnote 22.

discrimination. The same is true with respect to across-the-board increases granted by the counties.

In some years the state appropriates funds to be used to provide employees with "merit" salary increases. These funds, usually somewhat less than the cost-of-living funds, are intended to be used to reward those employees with superior job performance records as documented in the performance evaluation system previously referred to. In addition to the Performance Review Guide this system includes "quartile" rankings.[31] The appraisal of the

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[31] Under the quartile system each agent is placed in one of four quartile groups by the district extension chairman, and the determination of an agent's quartile ranking for each particular year is based upon his performance during the preceding performance evaluation period. In determining an agent's quartile rank for a particular year his performance is measured against his goals and objectives for the year as set forth in the individual plan of work and how well the agent performs the duties and functions called

employee's performance by the county chairman, the district and state program leaders and specialists and the district extension chairman are also taken into account.

Based on the employee's job performance as thus evaluated the district exstension chairman then makes an actual merit salary recommendation for each individual agent and county chairman within his or her district, to be paid from funds made available from the merit funds allocated by the assistant director for county operations to the district. Each district extension chairman is advised of the total amount of merit money available for his or her district, but

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forin the job description. Agents do not compete against other agents' performance to achieve a quartile ranking but compete only against themselves and their performance is measured on an individual basis. Agents are not ranked within a quartile.

before the allocation of merit money begins the district extension chairman must first make salary adjustments to reflect any increases by the Extension Service during the previous performance period in the entry level salary for positions of assistant, associate and full agents.[32]

These procedures for fixing salaries and awarding merit increases are not in serious dispute, but plaintiffs seriously contend that through the years they have been discriminatorily implemented with the

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[32] For instance, in 1981 the increase in starting salaries required an adjustment in present employees' salaries in the amount of approximately $70,000. After this adjustment is made, the district extension chairman then makes a lump sum allocation of dollars to each agent within the first three quartiles. An agent in the fourth quartile ordinarily will not receive a merit increase. However such agent whose salary was below the entry level salary for his or her title will have received the adjustment made prior to the merit salary allocation process.

result that blacks have been paid substantially lesser salaries than have whites and that such discrimination has continued to this day. To prove this charge plaintiffs have resorted to statistical evidence and evidence of specific instances of alleged discrimination involving individuals. For the reasons to follow the court finds that the plaintiffs have failed to establish this claim by a preponderance of the evidence.

(i) The Statistical Evidence

Plaintiffs offered the testimony of Dr. Charles Mann, an admitted expert statistician with extensive experience in employment discrimination litigation. Using the now familar multiple regression technique,[33] Dr. Mann conducted a multiple

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[33] See Baldus and Cole, Statistical Proof of Discrimination, pp. 239, et seq. (1980); Article, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 Harvard L. R. 389

regression analysis for each of the years 1974, 1975 and 1981 based on data furnished the United States Department of Agriculture by the Extension Service with the following results.

For the year 1974 he included 540 county level professionals. Controlling for tenure[34] and education he found the regression coefficient for race, that is, the excess of the salary of a white over the salary of a black, to be $1,112.00,

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(1975); and Fisher, "Multiple Regression in Legal Proceedings," 80 Columbia L. R. 702 (1980).

[34] In Dr. Mann's 1974 and 1975 regression analyses tenure was defined as the difference between the date of the personnel file and the date when the individual's current appointment with the Extension Service began without a break in service. His 1981 regression analyses used the defendants' definition of tenure, that is, the difference between the date of the personnel file and the date when the individual's current appointment with the Extension Service began without a break in service, plus years of prior federal service, and added one year.

and he testified that this was statistically significant. When sex and program areas were added as independent variables the race effect exceeded $800 and remained statistically significant. When job title was added to tenure and education the race effect dropped to between $257 and $337 depending on the other variables included, but the results again remained statistically significant.

For the year 1975 Dr. Mann included 569 county level professionals. Controlling for tenure and education the regression coefficient for race was $1,207, a statistically significant effect. When sex and program area were added as independent variables the race effect exceeded $880 and remained statistically significant. When job title was added to tenure and

education the race effect dropped to $312 to $395 depending on the other variable included.

For the year 1981 he included 560 county level professionals. Controlling for tenure and education the coefficient for race was $970 which was statistically significant. When sex and program area were added as independent variables the race effect exceeded $560 and remained statistically significant.

In running his regressions Dr. Mann, of course, included only those variables which he was requested by his employers, the plaintiffs, to include. Consequently he included all county chairmen in all of his regressions and omitted job title as a variable in those regressions on which plaintiffs principally rely. Other variables which defendants contend impair the validity of Dr. Mann's regression will be

discussed later.[35] In answer to a question by the court he conceded that the inclusion of other variables could have affected the results. Tr. pp. 435-436.

(ii) Comparison of Individuals

It is undisputed that prior to the merger of the white and black branches of the Extension Service in 1965 salaries of professionals in the black branch on the average were less than those of their counterparts in the white branch. Following the merger this disparity was recognized and steps were taken to begin its elimination prior to the amendments to Title VII which brought the Extension Service under its coverage in 1972. Nevertheless the government has offered

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[35] Dr. Mann is a highly qualified statistician, but he disclaimed any expertise concerning factors that go into fixing salaries in the Extension Service. Plaintiffs called no expert to supply the information which Mann was unable to give.

evidence tending to show that as of January, 1973, the salaries of numerous black agents throughout the system were less than those of white agents in the same counties who were in comparable or lower positions and who had comparable or less tenure (GX 102). The government has also cited defendants' own exhibit (DX 48) as showing some salary disparities between blacks and whites as late as October, 1974.

The Extension Service's problem of bringing black and white salaries into line has been similar to that which faced most business enterprises with a prior history of racial discrimination following the passage of the Civil RightsAct of 1964. Just as it had been found in the area of education that there is no such thing as instant integration, it was soon found in the field of business and

industry that there is no such thing as instant quality in employment. Without risking serious disruption of a business by prohivitively costly budgetary alterations and a possible practice of wholesale reverse discrimination it was soon recognized (though not always by the courts) that the adjustments mandated by the law simply could not be made overnight. The dilemma of the Extension Service was further compounded by the fact that its operating funds came from three separate political entities each of which retains a voice in all major employment decisions.

To recognize these problems, however, is not to excuse non-compliance with the law. The court has therefore carefully reviewed plaintiffs' evidence showing individual salary comparisons and as a result has concluded that while on its

face and evidence unquestionably establishes salary disparities, when viewed in the light of defendants' explanatory evidence it fails to prove discrimination.

The exhibits referred to have not been found persuasive for several reasons. To begin with the January, 1973 figures shown on GX 102 are only selected examples taken from across the state almost ten years ago, and in most instances the differences in pay between the black agents and white agents is very small. There is nothing to show the areas of responsibility of the agents compared and more importantly, there is no way to make a comparison between the job performances of the agents. The information contained in DX 48 is similarly inconclusive. The lack of probative force of such evidence

becomes more readily apparent when the cases of three specific individuals cited by plaintiffs are considered.

Martha B. Thomas, a named plaintiff black, was employed as a home economist by the Extension Service in 1970. She had come to North Carolina from Mississippi where she had gained some experience in the Mississippi Extension Service. Although there is nothing to indicate that she was not employed at the then applicable entry level salary, she complains that the salary of a white home economics agent was $500 more than hers at that time. In rebuttal defendants showed that the white agent was already an associate agent at the time Thomas was first getting started as an assistant agent. Another white home economics agent shown by plaintiffs to have had a higher salary than Thomas was shown by defendants to

have been a full agent with an extensive backlog of experience both as an extension agent and as a home economics teacher in the public schools. Finally, Thomas received a reprimand for her consistent failure after warnings to make certain required reports on time. She was told that the reprimand would go into her personnel record; that it would have an adverse effect on her future salary possibilities; and that she had a right to appeal the decision. She did not do so.

Johnny Jones, a black, was employed by the Extension Service in Greene County in February, 1971, with several areas of responsibility including 4-H. Because of a $100 mix-up" in his salary, which was corrected at mid-year, he joined as a plaintiff in this action in November of that year. In July, 1972, he was transferred to Craven County, promoted to

associate agent and given a salary raise. In early 1973 he transferred to Durham county where he worked exclusively in "urban 4-H" work under a black county chairman. The extension Service portion of his pay in Durham County came from "1890 funds."[36] In 1978 for reasons not quite clear unless it was to return to the area of his birthplace and longtime residence, Jones applied for and was given a transfer to Leonoir county to work as an agricultural agent.[37] Jones testified that

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[36] Funds made available by Congress especially for the benefit of balcks to be administered through the 1890 land grant colleges, in this case A & T University at Greensboro, North Carolina.

[37] After entering the employment of the Extension Service Jones pursued a course of graduate studies at NCSU which ultimately led to a master's degree in adult and community education in 1977. Had he remained in urban 4-H work this additional education would doubtless had been of considerable value to him and the Extension Service. Its value in this work as an agricultural agent would appear to be minimal, and in any event it does not

he had "buried the hatchet as far as salary was concerned," but that it "resurfaced" when, following a recess in the trial during which he was shown by a government attorney that a white agent in Lenoir county, one Jimmy Pollock, was being paid about $2,000 per year more than he, Jones testified "I just feel like I may be underpaid."

With respect to Jones the evidence of the defendants showed that while he was a very competent agent, particularly in his field of 4-H work, Agent Pollock with whom he was sought to be compared, was an exceptionally well qualified livestock agent with a rare expertise in swine; that Pollock had been lured away from his employment with the Extension Service by

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support a claim of disparate salary treatment when his salary is compared to that of a competent, experienced agricultural agent without a master's degree.

a higher salary with the North Carolina department of Agriculture where he continued to add to his knowledge and expertise over a period of about five years; that because of Lenoir County's position of importance both in the state and nation in livestock production it was necessary to have an agent of Pollock's competence to carry on the livestock program in that county; and that in order to get Pollock back it was necessary for the Extension Service to match the salary which he was paid by the Department of Agriculture. From all the evidence there arises absolutely no inference that race had anything at all to do with the differential between the salaries of Jones and Pollock.

Wanda Wilkins, a non-plaintiff black woman who joined the Extension Service in Greene County in 1974, testified for the

plaintiffs that she would make $400 less in 1982 than a white woman agent with comparable tenure; that she had had a master's degree since 1980 while the white woman has only a bachelor's degree; and that she has concluded that her failure to get promotions and raises has been because of her race.

The defendants on the other hand showed that over the five-year period during which Wilkins was studying for her master's degree she was commuting to Raleigh from Greene County - roughly a one an one-half to two-hour drive each way; that she was given a total of eighty-five days off in which to pursue her graduate studies but nevertheless her extension programs suffered during the time she was commuting to graduate school and still trying to keep up with her work; that her performance record, particularly in the

field of 4-H which constituted eighty per cent of her work, was far short of what was expected of her; and that her salary simply reflected her poor productivity.[38] It is perhaps significant that she has never sought to intervene in this action.

In summary, the statistical evidence of plaintiffs standing alone and without further explanation probably suffices to make a prima facie showing of discrimination in salaries; the corroboration to be found in the comparison of salaries of individuals in the exhibits is at best

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[38] It appeared that in 1980 out of a potential of over 4,000 children Wilkins only had 124 involved in 4-H, down from 213 in 1973, the year before she went to work, 360 in 1977 and 487 in 1978; that she had nine clubs organized whereas the average for the 4-H agents in the state is thirty clubs and 400 members; that her average day participation in district activity was five whereas the counties average twelve; and that participation by her children in the 4-H Congress never exceeded three while the average for other agents was ten.

meager; and the evidence in the three individual cases proposed by plaintiffs as representative has been completely rebutted.

Turning then to defendants' evidence on the question of salaries we begin by considering the alleged defects in the plaintiffs' statistical evidence. It will be remembered that Dr. Mann's regression analysis, which forms the centerpiece of plaintiffs' salary discrimination claims, in addition to race contained only two independent variables, tenure and education. Defendants contend, and the court is constrained to agree, that the omission of other equally if not more important variables so flaws the results of the regression that it cannot be accepted as preponderant proof of plaintiffs' claims.

> Statistics are ... competent in prov- ing employment discrimination. We caution only that statistics are not irrefutable;

> they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances.

Teamsters, 431 U.S. 324 at 339-40.

It has been said that multiple regression models never conclusively prove anything. They merely describe statistical relationships. While a negligible coefficient for race may warrant the inference that race is not an important factor to the employer in fixing salaries, the converse is not necessarily true for legitimate qualification variables may have been omitted from the model. Baldus-Cole, supra, at p. 243. Here the defendants list numerous variables omitted from plaintiffs' regression which sharply limit if not indeed destroy its probative force.

More specifically defendants point to the failure of plaintiffs' regression to include

(1) Performance of agents measured against the agents' plan of work;

(2) The variations in salaries created by across the board state raises with the different percentage of state contributions in each county;

(3) The across the board increases in agent salaries by some counties and not in others;

(4) The merit raises provided by the state;

(5) The merit raises provided for by the counties in which Extension Service personnel have no input;

(6) The merit raises provided by the counties with limited or full participation in the merit recommendation by Extension Service personnel;

(7) The range in merit salary increases provided by the counties (0 - 12% in 1981);

(8) Prior and relevant experience; and

(9) Variations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience.

It will be observed that all these variables are difficult if not impossible to measure and quantify. Thus neither side undertook to incorporate them in their regressions. Yet it is indisputable that following entry level the single most important factor in determining salaries for the Extension Service professional staff is job performance. As previously stated, each employee is evaluated annually on the basis of his or her job performance measured against a standard of acceptable performance. The agent participates in this evaluation process and the results are reflected in salary changes such as merit raises made thereafter. But even so, other factors over

which neither the Extension Service nor the agent has any control are constantly influencing salary changes. Examples of such factors are the differences in the state contributions to salaries in each county, the differences in across-the-board increases in agent salaries and merit raises in some counties and not in others and market forces.[39] Even among

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[39] The influence of market forces on salary has been illustrated previously in the case of Agent Pollock. At the time he was rehired by the Extension Service livestock agents were in short supply and it was necessary to pay more to hire and retain him that it would have been to hire and retain other more plentiful agency such as home economists and 4-G agents.

> "We had a vacancy in a dairy agent position back within the last twelve months. That position stayed vacant for almost a year for the simple reason that we could not find a dairy-trained agent at the price we were able to pay. We have a standard starting salary, and we simply could not go into the market and hire a dairy agent for that price. ... Over the years, certain areas seem to be

agents with the same program responsibilities the salarydemands may differ substantially from county to county. For instance, an agent with tobacco responsibility in a large tobacco-growing county will command a larger salary than an agent with the same responsibility in a county where tobacco is not the major crop.

A principal criticism of plaintiffs' statistics is based on the fact that the raw data on which they were based includes the salaries of county chairmen. Although the selection process, as we have seen, is not discriminatory, a relatively small

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in short supply and therefore the demand is great and the starting salaries are high. A few years we were in almost the same situation with horticultural agents. But not, there is a fairly plentiful supply of horticultural graduates available. Therefore we generally can find what we are looking for in that area. Blalock, Tr. pp. 3457-8.

number of blacks have applied for these positions and the result is that ninety-four of the one hundred county chairman positions are held by whites. Because these top county positions go to the highest qualified agents who possess administrative and leadership qualifications in addition to their professional expertise, they naturally command the highest salaries at the county level - an average of at least $4,000 per year more than the average salaries of all other agents. It is immediately apparent, therefore, that when the salaries of these ninety-four white agents are included with those of the few hundred other agents in the plaintiffs' regression, the results are going to be distorted.[40] Plaintiffs,

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[40] The size of the distortion depends upon whose salary data figures are accepted as accurate. The parties are at odds as to the correctness of the salary data used by Dr. Mann in his regression. Since computer

while admitting through Dr. Mann that it is proper to include job titles (here assistant agent, associate agent and full agent) in a salary regression if it does not "obscure race effect," (Tr. pp. 369-70), contend that the evidence on discrimination in promotions in this case is "overwhelming" and therefore job titles were properly excluded in Dr. Mann's

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tapes were not available for the years 1974 and 1975 Dr. Mann used tapes for later years together with other personnel records furnished him by the United States Department of Agriculture to work backward and create tapes for those years. While the regression based on this reconstruction showed 569 salaries, the defendants were able to find only 318 salaries recorded in the column Dr.Mann identified as having been the source of the salary data included in his regression. If the defendants' figures are accepted as correct, it thus appears that almost one-third of the salaries included in the Mann regression were those of county chairmen. Since the burden was on the plaintiffs to establish the accuracy of the data to which their statistics were based, the court is constrained to accept defendants' figures as being more accurate in this instance.

regression. For the reasons previously stated the court has rejected this contention, and it now holds that job titles were improperly omitted from plaintiffs' regression and the salaries of county chairmen were improperly included therein. Agarwal v. Arthur G. McKee & Company, 664 F.2d 8903 (9th Cir. 1981), affirming Agarwal v. McKee, 19 FEP Cases 503 (N.D. Cal. 1977); Wilkins v. University of Houston, 656 F.2d 388 (5th Cir. 1981), rehearing denied, 662 F.2d 1156 (5th Cir. 1981); Presseisen v. Swarthmore College, 42 F. Supp. 593 (E.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978); Fisher, supra, 80 Columbia L. R. 702, 721 n.32 (1980).

Dr. Francis Giesbrecht, a qualified expert in the field of statistics, prepared several multiple regression analyses for defendants. Using the same

statistical methodology employed by Dr. Mann and most of the same data, when he controlled for the same independent variables as did Dr. Mann the results were not significantly different. When the county chairmen were omitted the coefficient for race dropped sharply, and when quartile rankings were added to tenure, education and job title the race effect was reduced to $142 in 1981. The use of these variables accounted for seventy-seven per cent of the total salary variations between blacks and whites. Dr. Geisbrecht testified that "it is a subjective decision as to whether that explains enough of it or not" and that he would expect that the addition of other factors such as variations in county salaries and work in different crops would lead to some changes. Tr. p. 6210.

After considering the great mass of statistical evidence produced by both sides about the only firm conclusions the court was able to reach were that when the only independent variables used in a salary regression were tenure and education the coefficient for race was significant; that individual salaries are affected by a large number of factors; that when other valid factors were introduced the race effect diminished but did not disappear; and that there are several unmeasured factors, notably job performance, the absence of which seriously flaws the results.

> Multiple regression analysis is a relatively sophisticated means of determining the effects that any number of different factors have on a particular variable; while it may be the best, if not the only, means of proving classwide discrimination with respect to compensation in a case such as this - where a number of factors operate simultaneously to influence salary - it is subject to misuse and thus must be employed with

> great care. Ideally, when a multiple regression analysis is used, it will be the subject of expert testimony and knowledgeable cross examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis. In the instant case, the statistical evidence associated witn the multiple regression analysis is inconclusive, raising more questions than it answers.

Wilkins v. University of Houston, 654 F.2d 388, 402-3 (5th Cir. 1981), a case strongly relied on by defendants. On petition to rehear the case and suggestions for rehearing en banc the plaintiffs were able to show that defendant's expert statistician had given testimony (apparently through inadvertence) to the effect that his regression analysis model without a sex variable had produced a table showing that men and women were treated equally with regard to pay when in fact he

was using another regression analysis which did contain a sex variable. While the point was held to cast doubt and render incorrect statements in the court's original opinion which relied on this erroneous testimony, in denying the petition the court said:

> Nonetheless, we still adhere to our original conclusion and affirm the district court on the class plaintiffs' faculty compensation claim.
>
> The thrust of our original opinion on faculty compensation remains unchanged; plaintiffs have failed to demonstrate the validity of the multiple regression model as a whole. ... Since multiple regression analysis is subject to misuse, courts cannot be expected to accept at a face value conclusions derived from such a model absent expert testimony concerning the validity of the model itself. ... [W]hen the class plaintiffs purported to use the university's statistics for their own purposes, they did not fulfill their burden of showing that the multiple regression analysis model employed was valid. Without guidance, this court cannot be expected to

> resolve in the class plaintiffs' favor fundamental questions relating to the model itself. (Footnotes omitted.)

Wilkins v. University of Houston, 662 F.2d 1156, 1157 (5th Cir. 1981).

In an attempt to explain and distinguish Wilkins the plaintiffs filed a supplemental brief in which they point to the court's emphasis on "the need for expert testimony to enable the trial court to assess the validity of the regression model and the significance of the results." Plaintiffs assert that their expert, Dr. Mann, testified that the results of his regression were "meaningful and statistically significant," and that using the same methodology defendants' expert obtained the same results. The court accepts this testimony at face value so far as it goes, but the difficulty with plaintiffs' argument is that the statisti-

cians disclaimed any expertise in the area of the factors that go into determining Extension Service salaries, and the court was left with only the testimony of Extension Service professionals to supply this information (see Footnote 35, supra). At the same time both statisticians conceded that if additional variables (not tainted by race) were included in the regressions, the results would be substantially altered. Implicit in the testimony of Dr. Mann as to why he included county chairmen but not job titles in his regression was that he felt (or perhaps had been instructed) that these variables were tainted by race. Certainly it is plaintiffs' position that they were so tainted, but as stated before the court has rejected this contention.[41]

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[41] It is true, as plaintiffs assert, that defendants' expert, Dr. Giesbrecht, did not question Dr. Mann's methodology and

And so, like the court in Wilkins, this court is left without expert testimony concerning the validity of the regression model itself, and without such guidance the court cannot be expected to resolve fundamental questions relating to the model in plaintiffs' favor.

The defendants offered other evidence tending to negate the inferences raised by the statistical evidence. In 1976 when the salaries of all agents except county chairmen were compared the average salary of white agents exceeded that of black agents by $130, but the average tenure of the white agents exceeded that of the black agents by 1.5 years. In that same

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results, but Dr. Giesbrecht's own evidence went considerably further. Dr.Mann came back to court to hear Dr. Giesbrecht testify, and the court considered it significant that he was not recalled to rebut any of Dr. Giesbrecht's testimony. The inference is that he did not disagree with it.

year the salaries of black agents with a bachelor's degree exceeded that of white agents with the same degree by $121 although the average tenure of the white agents exceeded that of the black agents by 1.6 years. In 1976 blacks with master's degrees averaged $409 less in salary than whites with master's degrees and 1.5 years less tenure. The figures for 1979, 1980 and 1981 showed comparable results with the blacks with bachelor's degrees and blacks with master's degrees exceeding the average salaries of their white counterparts in five instances out of six. The fact that the average salaries of all white agents when compared with all black agents is slightly higher was accounted for by the fact that a far greater percentage of white agents than

black agents have master's degrees. The figures are contained in DX 201-205 inclusive.

Finally, the defendants offered a series of graphs sometimes referred to as "scattergrams" showing the relationship of salary to tenure of black and white agents at the various county job levels for the years covered by the salary regressions. DX 256, et seq.; Giesbrecht, Tr. pp. 6180, et seq. Using the data from defendants' salary regression when plotted on these graphs the salaries of blacks and whites were displayed in a completely random distribution.[42]

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[42] Each side also introduced exhibits showing that certain individuals made more or less than certain other similarly situated individuals. Because, as has been previously shown, job performance and unmeasurable factors go into practically all salary decisions the court is unable to assign any significant probative force to these exhibits.

Having thoroughly considered all of the evidence bearing on the salary issue and the contentions of the parties based thereon, the court has concluded that it if be assumed that plaintiffs made out a prima facie case on this issue, it has only been by virtue of the plaintiffs' statistical evidence based on the multiple regressions of Dr. Mann; that because of their failure to include many of the vital factors necessary to be considered in fixing salaries the probative force of these statistics has been so substantially undermined that they cannot sustain a finding of purposeful discrimination in salaries under any of the statutes on which the action is based;[43] that the

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[43] Faulty statistics do not create a prima facie case. Allen v. Prince George's County, 538 F. Supp. 833, 849-55 (D. Md. 1982) (in an action against a public employer our same Dr. Charles Mann's regression analysis was rejected becuse it did not exclude pre-1972 hires). Even

defendants have not only "articulated" plausible reasons for the seeming salary disparities, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), but have satisfied the court of the validity of their explanations; and that the plaintiffs have not shown that defendants' reasons were pretextual.[44] It follows that plaintiffs have failed to establish by a preponderance of the evidence that the Extension Service has discriminated against black employees in the matter of salaries.

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where the statistical compilation result in "lopsided ratios," they are not conclusive proof of discriminatory employment practices. EEOC v. United Virginia Bank/Seaboard National, 555 F.2d 406 n.6 (4th Cir. 1977).

44 "Statistical evidence of the existence of de facto discrimination is not determinative of the pretext issue." Agarwal v. McKee & Company, 644 F.2d 802, 806 (9th Cir. 1981).

IV. Segregating Blacks In Work Assignment

Prior to the merger of the two branches of the Extension Service in 1965 black agents worked only with black clientele and white agents worked only with whites. There is no substantial evidence that this practice continued after the merger. In those instances in which black agents continued to spend a disproportionate amount of their time working with blacks there is no evidence that this has not been a matter of choice with the agent instead of any requirement on the part of the Extension Service. Rather, the evidence showed that the assignment of agents was largely the result of numerous factors such as employee preferences, job qualifications and conditions affecting job availability. Such evidence will not support a finding

that blacks have been intentionally segregated in their work assignments for racial reasons.[45] Hilton v. Wyman Gordon Company, 624 F.2d 379 (1st Cir. 1980).

V. Failing to Establish Valid Tests.

The allegation is that the Extension Service has failed and refused "to establish valid qualifications, tests, selection standards and procedures which are sufficiently objective to prevent continuing discrimination in hiring and promotion." It is at once apparent that the allegation assumes a fact which the

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[45] If this has ever been a problem since the merger, in view of the rapid decline in the black farmer population it could not remain one long. According to the United States Bureau of the Census there are now only 57,271 farms currently operated by blacks in the United States, down from 926,000 in 1920. The current rate of decline of black-operated farms is two and one-half times the rate of decline of white-operated farms. Report, U.S. Commission on Civil Rights, The Decline of Black Farming in America, February, 1982.

court has failed to find from a preponderance of the evidence, that is, that the defendants have discriminated in their hiring and promotion procedures. These procedures have been previously described in detail in the sections on hiring (Page 20, et seq .) and promotion (pages 23, et seq.) and will not be repeated here.

Since all professional positions in the Extension Service are also faculty positions at NCSU and all require college degrees, it is difficult to understand just what additional tests plaintiffs contend the Extension Service should administer in connection with its hiring practices.[46]

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[46] Plaintiffs produced no evidence of any person claiming to have been wrongfully denied employment by the Extension Service on account of race, and no such person joined as a plaintiff in the action.

The use of the performance review guide in connection with promotions has been referred to previously (see Footnote 22). Chief architect of this performance evaluation system was Dr. Edgar J. Boone, an assistant director of the Extension Service and head of the Department of Adult and Community College Education at NCSU. He had had over twenty-five years' experience in Extension Service work, the last nineteen of which have been in North Carolina. He has been engaged principally in program analysis and personnel development. His primary responsibility with the Extension Service is in the staff development program. He is a nationally recognized authority, and the court was impressed with his expertise in this field.

Following extensive work during the 1960's in developing a programming guide and job descriptions for Extension Service agents work was begun under Dr. Boone in 1970 to develop a method of appraising the performance of Extension Service workers. Separate biracial committees were formed for this purpose, and over a period of two years there were developed two performance review guides, one for county agents (DX 237A) and one for county chairmen (DX 237B). They are used as counseling and diagnostic tools, and while their primary purposes are to enhance job satisfaction and professional competence, to assist agents in recognizing areas where improvement is needed and to assist the Extension Service in more effectively accomplishing its mission, they re also one of the many things considered in fixing salaries and awarding promotions. In the opinion of

Dr. Boone the performance review guide does not discriminate against blacks, has never been so used and does not have an adverse impact on blacks.[47] A grievance procedure is available to any employee not satisfied with the evaluation on his or her work by the performance review guide, but to date no agent, black or white, has resorted to the use of this grievance procedure.

Prior to 1979 USDA at a cost of approximately one million dollars contracted with the American Institute for Research to develop a national performance appraisal system for the Extension Service. A comparison of the results ofe

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[47] Dr. Boone conceded that no studies had been conducted to make this determination. Significantly, although charged with the burden of establishing discrimination, the plaintiffs with all the United States Department of Agriculture (USDA) resources at their command, have apparently conducted no such study either.

this study with that already developed in North Carolina by the Extension Service shows that they both undertake to measure essentially the same elements of job performance and that the only material differences between the two systems are that under the North Carolina system the agent participates in self-evaluation while under the national system he does not; and under the national system weights are assigned to the various job duties while under the North Carolina system weights are not assigned. The national system is comparatively new and it has only been adopted in full in one state. The North Carolina system, on the other hand, was first adopted in 1972, and it has been under periodic review and revision over a period of ten years. It has been studied by representatives of

forty-one states, and portions if not all of it have been adopted in a great many states.

The conclusion is that the performance review guides in use in North Carolina are valid devices for measuring the performance of Extension Service agents; that they are not racially discriminatory; and that plaintiffs have fallen far short of establishing by a preponderance of the evidence that the Extension Service had failed to establish valid qualifications, tests, selection standards and procedures for use in its hiring and promotion practices.

VI. Failing to Correct Present Effects of Past Discrimination.

The allegation is that defendants have failed and refused "to take appropriate action to correct the present effects of past racially discriminatory policies

and practices." Here again the allegation involves the assumption that there has been discrimination in the past the effects of which continue, a thesis staunchly denied by defendants. Assuming the correctness of the assertion, however, nowhere in the statute law is there found any specific requirement that an employer must take affirmative steps to eradicate possible continuing effects of prior discriminatory practices. Plaintiffs have cited no pertinent employment discrimination cases in support of their position, but they have cited and relied on several school desegregation cases such as Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), for the proposition that there is a continuing duty to dismantle unconstitutional school systems which rule by analogy should be applied here.[48]

[48] Insofar as plaintiffs' claims are grounded

These cases are considered distinguishable, however, for in all such cases a clear and present violation of the law is involved. By contrast, in the employment context the fact that a completed

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on Title VII Hazelwood, supra, affords some guidance.

> "Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formally maintained an all-white work force by purposefully excluding Negroes. Id., 433 U.S. at 309.

This court has found that at least since 1972 the defendants have made all their employment decisions in a wholly nondiscriminatory manner. Even where a Title VII violation has been found declaratory and injunctive relief are not required where the evidence shows that the forbidden employment practice has been abandoned and the employer has indicated the intention to comply with the law in the future. Williams v. Yazoo Valley-Minter City Oil Mill, Inc., 469 F.Supp. 37, 52 (N.D. Miss. 1978).

prior discriminatory act has an impact which continues into the present is not actionable under the employment discrimination laws. United States v. Evans, 431 U.S. 553, 558 (197); Farris v. Board of Education, 576 F.2d 765 (8th Cir. 1978); Wilson v. Allied Chemical Corporation, 456 F. Supp. 249 (E.D. Va. 1978); Annotation: 49 A.L.R. Fed. 693.

Notwithstanding the lack of any statutory or case law requirement that it take affirmative action looking to the elimination of any residual discrimination of pre-Act origin the Extension Service has taken highly commendable steps to conform its employment practices to the law. It would unnecessarily prolong this opinion to list the actions taken, but they are summarized in detail in defendants' proposed findings of fact Nos.

256-267 inclusive which the court adopts as its own and incorporates herein by reference.

The result has been that the number of black professionals employed by the Extension Service increased by 14 per cent between 1970 and 1979, the latest date for which figures were available, and during this period the salaries of black professionals increased by 121.8 per cent while salaries of whites were increasing only 114.1 per cent. Nationally the percentage of non-white professional Extension Service employees is five per cent. In North Carolina it is seventeen per cent.[49]

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[49] Only South Carolina with twenty per cent ranked higher. By contrast the USDA, which started out as a co-defendant with the Extension Service in this action but wound up on the opposite side of the versus when the Department of Justice entered the picture, had only 7.1 per cent black employees in all pay grades in 1979 and only 3.1 per cent in grade GS-12 and above. The Extension Service is hampered in its efforts to recruit even more blacks

The Extension Service currently employs blacks at a rate approximately three times the proportion they represent in the total labor pool from which it recruits.

A violation by the defendant of any duty, statutory or otherwise, "to take appropriate action to correct the present effects of past racially discriminatory policies and practices" has not been established.

VII. Failure to Provide Equal Services to Minorities.

The allegation that the defendants have failed to provide minorities with services equal to those provided white persons need not detain us, for there was no evidence at all to support this allegation and counsel for the government

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by the fact that the USDA actively competes with the Extension Service for the highest qualified blacks and is able to pay higher salaries.

finally conceded that the defendants are not discriminating in the delivery of their services to all races. Tr. pp. 3285-6672.

VIII. Failure to Provide Services On A Non-Racially Segregated Basis.

The allegation is that defendants have failed "to provide services to 4-H clubs, extension homemaker clubs, farmers and other persons on a non-racially segregated basis." There was no evidence that the Extension Service provides services to "farmers and other persons" on a racially segregated basis, but it is not disputed that there are many 4-H clubs and extension homemaker clubs throughout the system whose members are all of one race. The services provided by the Extension Service to such clubs of necessity are provided on a racially segregated

basis.[50] The issue thus raised is subsumed in the question of whether the existence of such racially segregated clubs violates federal law, and this is the subject of the next section of this memorandum.

IX. Maintenance of Racially Segregated 4-H and Extension Homemaker Clubs.

The allegation is that defendants have failed to maintain non-racially segregated 4-H clubs and extension homemaker clubs. As stated, there are many such clubs in North Carolina, and there are many clubs to which members of both races belong. The question is whether or not the action of the Extension Service in recognizing and furnishing

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[50] There is no evidence to show that the quality of such services is any different for the clubs of one race than for the other. None of the named plaintiffs representing 4-H and extension homemaker clubs gave testimony at the trial.

services to the segregated clubs violates Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which proscribes action forbidden by the Fifth and Fourteenth Amendments. Regents of University of California v. Bakke, 438 U.S. 265(1978); Taylor v. Cohen, 405 F.2d 277, 281 (4th Cir. 1978). The Act states simply that

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Plaintiffs contend that the members of one-race clubs are subjected to discrimination in violation of this statute and the Constitution when they receive services from the federally-funded Extension Service; that the Extension Service should take affirmative steps to

require these clubs to merge with clubs in the same community that are of another race; and that should these efforts fail the Extension Service should withdraw its services from any club which failed to integrate. Defendants, on the other hand, contend that membership in these clubs is entirely voluntary; that the is no evidence that any one of either race has ever been excluded from membership in any club, or participation in, or denied benefits of, any program or activity for the Extension Service;[51] and that Extension Service produced no witness who testified

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[51] There was evidence of one isolated instance in which a black child was told by a voluntary worker from the community that he would not be welcome as a member in a white 4-H club. The worker was promptly removed by the Extension Service and the child was admitted.

that he or she had ever been discriminated against in connection with the delivery of services by the Extension Services.[52]

The evidence adduced at the trial fully supports each of defendants' contentions. No witness appeared to testify that membership in any 4-H or extension homemaker club was anything but voluntary; or that he or she had been denied membership in any such club on the basis of race; or that he or she had ever been subjected to discrimination with respect to any services offered by the Extension Service.[53] The question remains,

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[52] Defendants made a further contention that to withdraw services from these segregated clubs would be to deny such services on the grounds of race - itself a violation of Title VI. In view of the court's finding that the furnishing of services to the clubs does not violate Title VI it is not necessary to decide this interesting question.

[53] The evidence shows, and plaintiffs do not question, that for all phases of club activity above the community club level,

therefore, as to whether the law requires that these clubs be integrated. The court has concluded that it does not.

Since the evidence has failed to show exclusion from participation in or denial of benefits of or discrimination in the delivery of services, no violation of Section 601 of Title VI, 42 U.S..C. § 2000d, has been established. We next look to the regulations adopted by the USDA pursuant to the directive of Section 602 of the Act, 42 U.S.C. § 2000d-1. These are found in 7 C.F.R. § 15.1, et seq.

Following a general prohibition of discrimination in language tracking that of Title VI, Section 15.3(b) of the regulations lists some specific discrimi-

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all extension staff and volunteer club leaders, all county-wide, district and state meetings and training sessions are fully integrated. In working with the clubs all agents work across racial lines.

natory actions which are prohibited. One of these is that a recipient of federal funding may not on the grounds of race, color or national origin "[s]ubject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program."

Section 15.3(b)(6) provides:

> (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
>
> (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

Section 15.3(d) lists programs and activities together with illustrations, by way of example only, of types of activities covered by the regulations. With respect to Extension Service programs the following are listed as prohibited activities:

> (i) Discrimination in the use in any program or activity of the Cooperative Extension, demonstrations, information, and publications offered by or through the Cooperative Extension Service;
>
> (ii) Discriminationin the use in any program or activity of the Cooperative Extension Service of any facility, including offices, training facilities, lecture halls, or other structures or improvements; or
>
> (iii) Discrimination training activities, admission to or participation in fairs, competitions, field days, and encampments, conducted or sponsored by, or in which the Cooperative Extension Service participates.

It will be observed that in order to establish a violation of any of these regulations it is first necessary to establish that the action complained of was taken "on the ground of race, color, or national origin." There has been no such showing in this case. No individual has been "subjected" to segregation or separate treatment by the defendants. If any individual has become a member of a club composed only of members of his or her own race, it has been an entirely voluntary act without any force or coercion on the part of the Extension Service. Indeed, the Extension Service requires that each club formed certify that membership in the club is open to all races. There is no evidence of discrimination in making available the instructions, demonstrations, information and publication of the Extension Service ; or

in the use of any structure or training facility; or in training activities, competitions or encampments sponsored by the Extension Service.[54] Finally, the plaintiffs insist that certain "guidelines" issued by the USDA in connection with its regulations require the Extension Service to use "all reasonable efforts" to integrate the 4-H and extension homemaker clubs.[55] Defendants contend that their efforts to integrate the clubs have been

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[54] Prior to the merger the North Carolina Extension Service, like those in all other southern states, maintained separate summer camps for black and white 4-H clubs. Although many states in the south closed their 4-H camps in 1964 and 1965, following the merger the defendant here elected to continue camp operation and to work toward a fully integrated camping program at all 4-H camps. By 1972 all of the camps in the state had been fully integrated.

[55] Because of the pendency of this suit North Carolina was exempted from the requirement of these guidelines that an affirmative action plan be developed. Tr. p. 6520.

reasonable, but in any event the guidelines do not have the force of law. Although requested by the court from time to time to produce some authority to the contrary, plaintiffs were never able to do so. While administrative interpretations of statutes and regulations are entitled to deference, they are not controlling.

> The actions of [HEW], as its guidelines, are entitled to respectful consideration, for, in large measure or entirely, they are a reflection of earlier judicial opinions. We reach our conclusion independently, for, while administrative interregation may lend a persuasive gloss to a statute, the definition of constitutional standards contolling the actions of states and their subdivisions is peculiarly a judicial function.

Bowman v. County School Board, 382 F.2d 326, 328 (4th Cir. 1976).[56]

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[56] This case also approved "freedom of choice" in school desegregation cases provided the initial assignments are not involuntary and dictated by racial criteria, a situation not present here.

Two other cases have considered the question of dismantling segregated 4-H and extension homemaker clubs by extension services, Wade v. Mississippi Agricultural Extension Service, 372 F. Supp. 1126 (N.D. Miss. 1974), aff'd in part, reversed in part and vacated and remanded in part, 528 F.2d 508 (5th Cir. 1976); and Strain v. Philpott, 331 F.Supp. 836 (M.D. Ala. 1971), and at variance with the rulings in these two cases. Closer examination reveals this not to be true.

In Wade defendants were required

In a companion case decided the same day, Green v .County School Board of Kent County, Virginia, 328 F.2d 338 (4th Cir. 1967), which was appealed, the Supreme Court, while declining to hold freedom of choice plans unconstitutional per se, held that when the use of such plan has proved totally ineffective in dismantling a state-imposed dual school system and other means promise speedier conversion to a unitary, non-racial school system, freedom of choice is not acceptable. Green v. School Board of New Kent County, 391 U.S. 430, 439-40 (1968).

> to take reasonable steps to eliminate discriminatory practices of local clubs by assuring that all private groups sponsored by MCES or affiliated with its program are racially nondiscriminatory in their membership policies and methods of operation. these steps include the discontinuance in MCES' sponsoring youth activities at racially segregated, private schools established to avoid public school desegregation, since such sponsorship is a state aid prohibited by the Constitution.

Id. p. 145. the reported opinion does not contain the order entered on this ruling, but the pertinent portion of the order is set forth in the opinion of the Fifth Circuit. 528 F.2d at 519 n.9. From this and the above quoted excerpt it is clear that the district court found actual discrimination, which this court has not; that the club meetings in Mississippi were being held in racially segregated private schools established to avoid public school desegregation which is not true in North Carolina; and that the remedy ordered was

that the defendant require the various clubs to implement affirmative action plans to eliminate all discrimination in their membership and program practices. It was required that the plans specifically contain the assurance that the clubs do not discriminate in their membership or activities on account of race and that these things be publicized. The evidence in the case at bar indicates that the defendants here would already be in substantial compliance with such an order. Even so the Fifth Circuit observed:

> The approach of the court to commandeer the 4H clubs is tenuous at best. No member of any white segregated 4H club was a party to the suit before the court. It is beyond dispute that for a personal judgment to be binding the court must have personal jurisdiction over the person against whom it is sought to be enforced. To enforce a judgment against a person not before the court clearly violates due process of law. Pennoyer v. Neff, 95 U.S. 714 (1878).

528 F.2d at 519. The same is true in this case.

In Strain v. Philpott, which involved the Alabama Extension Service, the plaintiffs (and the United States as plaintiff intervenor) as in this case alleged wholesale discrimination in every phase of the defendant's activities including the maintenance of racially segregated 4-H and home demonstration clubs. The court found that the "purported" merger of the black and white dual Extension Service systems in 1965 "thoroughly and effectively perpetuated and to a substantial degree aggravated the racial discrimination which existed previously." 331 F. Supp. at 842. There is no discussion of the clubs in the court's opinion, since the decree entered thereon is not published, we have no basis upon

which to compare the ruling of this court with that of the district court in Alabama.

Finally, if it be assumed that the action of the Extension Service in continuing to tolerate voluntary, racially segregated 4-H and extension homemaker clubs is somehow discriminatory, there remains the question of whether it is incumbent upon the plaintiffs to show that the discrimination is intentional. The authorities do not speak with one voice on this subject, but in this court's view the better reasoned cases hold that a showing of discriminatory intent or purpose is necessary in order to establish a violation of Title VI. Castaneda v. Pickard, 6488 F.2d 989 (5th Cir. 1981); Guardians Association of New York city v. Civil Service Commission, 633 F.2d 232 (2d Cir. 1980), cert. granted, 50 U.S.L.W. 3527;

Otero v. Mesa County Valley School District, 470 F. Supp. 326 (D. Col. 1979), aff'd on other grounds, 628 F.2d 1271 (10th Cir. 1980).

> Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.

50 U.S.L.W. at 4429-30.

> "Discriminatory purpose" intent as volition or intent as awareness of consequences. ... It implies that the decision-maker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administration of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Tested by these standards the evidence in this case falls far short of establishing discriminatory intent or purpose. Substantial evidence to the

contrary is to be found in the fact that the Extension Service has had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race; that it instructs its agents to encourage the formation of new clubs without regard to race; that it publishes its policies in the media; that all of its club work and functions above the local community level are being conducted on a fully integrated basis; that its 4-H camps are fully integrated and have been for over ten years; and that no person has been denied membership in any club on account of race. That the policies of the Extension Service have not operated to deprive blacks of club opportunities is evidenced by the fact that while the population of North Carolina is only twenty-two per cent

black, 4-H club membership has remained at approximately thirty-two per cent for the last ten years.

The simple truth is that in the matter of these one-race clubs the Extension Service has been faced with a dilemma which admits of no easy, readily available solution. On the one hand it has been under constant pressure from the government to eliminate racially segregated clubs or terminate services to them.[57] On

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[57] In a classic case or bureaucratic bludgeoning the director of the office of equal opportunity of the USDA in a letter drafted March 2, 1972 to Dr. John T. Caldwell, the Chancellor of NCSU, and a defendant in this case along with the USDA at that time, was told that the Extension Service was not in compliance with Title VI and the department's regulations, and he was given ten days in which to comply or have the case referred to the Department of Justice. Among other things required to be done, presumably within this ten-day period, were the following: devise new programs for minorities, provide services across racial lines, desegregate all clubs, give Negro agents first priority for consideration for all promotions to district and county chair-

the other hand there is the stark reality

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manships and the establishment of hiring quotas. Attachment A to Government's Motion to Dismiss filed January 3, 1975. In 1971 the Extension Service had submitted to USDA "a program for equal employment opportunity in the North Carolina Agricultural Extension Service": which the department had rejected because it did not conform in all respects to a "model"program promulgated by the department. Dr. Caldwell, himself a native of the deep south and one of the nation's foremost educators, in a letter dated October 29, 1971 to the department pointed out logical reasons why the "model" should not be adopted verbatim in this state and suggested compromise language that could be employed without changing the import and effect of the model. He concluded the letter thus: "Let me assure you again of our intent to conscientiously and vigorously implement an equal employment opportunity program within the North Carolina Agricultural Extension Service. The points we have raised in no way indicate a reluctance on our part to do what we feel is the intent of this law. We do feel that the modification we are suggesting still meet these requirements and will represent a program that we can earnestly strive to follow in every aspect and detail."

Three weeks thereafter this lawsuit was filed with the result that the good faith efforts of the Extension Service to resolve its differences with the Department of Agriculture were frustrated thus placing on this court the burden of doing

that in North Carolina as well as all other states integration of the races more frequently than not meets with strong resistance.[58]

The choice thus posed is whether it is better that the Extension Service continue to provide its much needed services to well over 100,000 North

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so more than ten years later.

[58] That whites are not alone in their desire to exercise the right of freedom of association is illustrated in this case by the action of the black extension agents in forming an organization known as "Friends of 1890." This followed the consolidation (forced by the Extension Service) of the two agents professional organizations, one black and one white, which had existed prior to the merger of the two branches of the Extension Service. Although membership in the organization is open to any friends or graduates of an 1890 land grant institution such as A & T, it has remained all black and no individual white has ever been asked to join. In addition to its social activities business meetings are held relating to the work of black extension agents. If needed the funds of the organization are used to support litigation of the type involved here. Tr. p. 795, et seq.

Carolina club members while striving to achieve full integration of the clubs or that it withdraw such services altogether as the government would have it do. The Extension Service has opted for the former, and in so doing this court does not perceive that it has violated the rights of anyone under any law.

SUMMARY OF PATTERN AND PRACTICE CLAIMS

The preceding nine sections of this memorandum list each of the pattern and practice claims alleged by the named plaintiffs and the government in their amended complaints, and specific reasons have been assigned as bases for the court's conclusion that none of them has been substantiated by a preponderance of the evidence.[59] In this section there will

[59] "[B]ecause it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or

be summarized some general considerations taken into account by the court in reaching its conclusions, some of which involve factual predicatesand legal principles not previously identified with specificity.[60]

'accidental' or sporadic discriminatory act. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the usual practice." Teamsters, 431 U.S. at 336.

60 Reference has been made to the "blue, red, yellow" system of marking the proposed findings of fact of opposing parties. Under this system each side was required to and did mark in blue pencil the proposed findings of the opposing party with which there was no disagreement; in red pencil the findings which were contested and objected to; and in yellow pencil the findings which were not contested but which were contended to be irrelevant. In addition to the specifically adopted findings previously listed the court now adopts as its own all proposed findings which were marked by the parties in blue and yellow.

The case has been hard fought by able counsel on all sides and it has not been an easy one to decide. At the outset the court was confronted with conflicting contentions as to whether it is a disparate impact or a disparate treatment case as those terms are defined in employment discrimination law. Disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Disparate treatment claims result when an employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Teamsters, supra, 431 U.S. 335-6. Disparate impact cases ordinarily involve the use of facially neutral devices such as employ-

ment tests, as in Griggs v. Duke Power Company, 401 U.S. 424 91971), which tests are not shown to be job-related or otherwise justified by business necessity and which result in the exclusion from employment benefits of a disproportionate number ofa favored group. The nearest thing in this case to such a device was the "quartiling" system discussed previously (see Footnote 31), but this is simply a measure of an agent's performance against his own annual plan of work and not against other agents. The system was not shown to have an adverse impact on blacks.

What we are left with, therefore, are the employment practices of the defendant Extension Service as they affect blacks in recruitment, hiring,promotion, assignments and salaries. The entire thrust of the plaintiffs' case has been that in these

practices defendant has treated blacks less favorably than whites on account of their race. The court has therefore concluded that the case should be analyzed under the disparate treatment test of McDonnell-Douglas v. Green , 411 U.S. 792 (1973), rather than the disparate impact test of Griggs.[61]

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[61] That the choice between the two tests is not always an easy one has been recognized by the Fourth Circuit in Wright v. National Achives & Records Service, 609 F.2d 702, 7120-13 (4th Cir. 1979), where the court seems to suggest inferentially in dictum (Footnote 10) that the choice may turn on the relative number of people affected by the alleged discriminatory practice. While the very essence of "pattern and practice" is a "standard operating procedure" which affects all the people in a favored group, it seems to this court that if the number test is going to be applied to determine whether a practice has a disparate impact rather than a disparate treatment effect, it is going to create more problems than it solves.

Having reached this conclusion, then, the ultimate issue is whether the Extension Service regularly and purposefully treats or has treated blacks less favorably than whites and whether this disparate treatment is racially motivated. EEOC v. American National Bank, 652 F.2d 1176, 1188 (4th Cir. 1981). A careful weighing assessment of the plaintiffs' statistical and non-statistical evidence led the court to conclude that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices, and the analysis proceeded on this assumption. While not conceding that plaintiffs had made a prima facie case, the defendant Extension Service assumed the burden of articulating plausible reasons for its actions, and its evidence, which the court found convincing, has been set forth

herein. When the plaintiffs failed to produce evidence to establish that defendant's reasons were pretextual plaintiffs' case failed. EEOC v. Korn Industries, Inc., 682 F.2d 256, 262 (4th Cir. 1981).

The big difficulty with plaintiffs' case and the statistical evidence offered in support of it is the assumption inherent therein that the professional white collar positions in the Extension Service are fungible and that there is a readily available labor pool of qualified blacks from which vacancies can be routinely filled. This is simply not the case.[62] Valentino v. United States Postal

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[62] Compare, for instance, a case tried in this Court, Sledge v. J.P. Stevens & Company, Inc., 585 F.2d 625 (4th Cir. 1978), where defendant's own evidence showed that the vast majority of textile workers it hired could walk in off the street and with minimal instruction go right to work.

Service, 511 F.Supp. 917 (D.C.D.C. 1981); Agarwal v. Arthur G. McKee & Company, 19 FEP Cases 503 (N.D. Cal. 1977). The fact is that blacks qualified for jobs in the Extension Service are in short supply.[63]

Moreover, the fact that a black professional is qualified does not necessarily mean that he is available. Form the North Carolina coast to the far reaches of the Appalachian Mountains is a distant of about 600 miles. In many of the eastern counties the population is about evenly divided between blacks and whites. Very few blacks live in the western counties.

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[63] Virtually every named plaintiff who gave testimony stated that subjective belief that they were qualified for a position and that it had been denied them on account of their race. "Basing recovery on that fact is an improper consideration. The question is whether or not the company did in fact discriminate, not whether or not the employee did in fact believe the company had discriminated." Lewis v. Tobacco Workers' International Union, 577 F.2d 1135, 1143 (4th Cir. 1978).

Traditionally, blacks have prefered to live in areas with substantial black populations. Fitzpatrick v. Board of Education City of Enid, 578 F.2d 858, 863 (10th Cir. 1978).[64]

There was discussion earlier of the fact that each of the one hundred counties in the state is a co-employer with the Extension Service and that each retains the veto power over all employment decisions at the county level. Only three of the counties were made parties to the

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[64] Black professionals are not always available to accept positions even in counties with substantial black populations. For example, in this case the plaintiff first named in the caption, P. E. Bazemore, declined to accept an appointment as county chairman in Montgomery County less than 100 miles from his home county of Union. Another named plaintiff, Carrie Thompson, declined to accept the county chairmanship of Washington County where she resides, and apparently no other black cared to apply for this position which had remained vacant for several months at the conclusion of the trial of this case.

suit. The chances that each of the one hundred counties would take the same approach to employment matters are probably remote, but in any event there was no evidence from which the court could determine that they would do so. The extent to which possibly discriminatory employment decisions may have been made solely as a result of positions taken by the various counties will never be known, but to assume that responsibility for any such decisions should be laid only at the door of the Extension Service would be to ignore another tragic legacy of our history - the realities of racial attitudes and their effects which have afflicted not only North Carolina but the entire nation for more than a century.[65]

[65] This is not to say that in the formation of its own decisions the Extension Service has any right to defer to local prejudices. Such defense was specifically rejected in Wade v. Mississippi Coopera-

> Certain vestiges of discrimination - although clearly not the most pressing problems facing black citizens today - are a haunting reminder of an all too recent period of our nation's history.

Justice Stevens (dissenting) in Rogers v. Lodge, ___ U.S. ___, 50 U.S.L.W. 5041, 5046 n.1 (1982).

Another regrettable legacy in our nation's history has been the substandard education afforded black citizens. The defendant here has for understandable

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tive Extension Service, 372 F. Supp. 1126 (N.D. Miss. 1974), but in that case Judge Keady apparently assumed that the defendant Extension Service had sole responsibility for all employment decisions, a position urged by plaintiffs on this court but rejected in the light of the contractual agreement between the Extension Service and the counties. And Judge Keady was writing without the benefit of General Building Contractors Association, Inc. v. Pennsylvania, ___ U.S. ___, 50 U.S.L.W. 4975 (June 29, 1982), which rejected the theory of vicarious liability as between two separate, autonomous employing units as we have here. See Footnote 10, supra.

reasons not advanced this as a specific explanation for any of its employment decisions involving the relative qualifications of black and white employees.[66] Nevertheless, it is a matter of common knowledge that the quality of education provided by the predominantly black institutions in this and other states simply has not measured up to that afforded by institutions such as NCSU which enjoy international reputations for

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66 The reluctance of the authorities in the Extension Service to acknowledge this fact was evidence in Chancellor Caldwell's October 29, 1971 letter to the USDA in which he said: "We are willing to include this paragraph provided we can omit the words 'predominantly minority group.'; Our staff feels very strongly that the inclusion of these words in that sentence conveys to our 'predominantly minority group' schools and colleges an implication of inferiority in terms of curriculum and content. We do not feel that this is, in fact, necessarily true and therefore prefer that these three words be omitted from the sentence."

excellence in their academic programs.[67] Yet until recently virtually all of the black employees of the Extension Service, through no fault of their own, were

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[67] This is no idle observation, but one with which the plaintiff-intervenor here, the United States, has expressed agreement. There is on record in this court a brief filed May 2, 1979, by the United States Department of Justice in Civil Action No. 79-217-Civ-5, State of North Carolina v. Department of Health, Education and Welfare, in which it is charged among other things "respondent state and its agents have developed traditionally white institutions to a greater extent than traditionally black institutions of comparable age, original mission, or level of degrees conferred. For example: respondent state and its agents have developed white institutions which were founded at or about the same time as black institutions in such a way that the traditionally black institutions are academically inferior, having less extensive course offerings than the counterpart white institutions."

Other examples cited included the lack of post-graduate program in the traditionally black institutions and discrimination against A & T specifically in the development and distribution of land grant programs. See also Adams v. Califiano, 430 F. Supp. 118, 120 (D.D.C. 1977).

graduates of these black institutions. While there is nothing in the record to show that they have not performed commendably in the discharge of their duties, it is just not realistic to equate the educational qualifications of many of these graduates with those of the graduates of the white institutions which, as the government rightly alleges, have been so long favored in the field of education opportunities afforded. Agarwal v. Arthur G. McKee & Company, 19 FEP Cases 503 (N.D. Cal. 1977).[68]

[68] It must be borne in mind that even when a black's objective qualifications are equal to those of a white aspirant to the same position the law does not require the employer to prefer the black over the white. Rather, the employer has the discretion to choose among equally qualified candidates so long as the decision is not based on race. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981).

The court has been impressed by the absence in this case of evidence of so many of the usual badges of discrimination. For instance there was no evidence

- that there has been any discrimination in the employment by the Extension Service of non-professionals.[69]
- that any black ever applied for a position and was turned down on account of race.
- that the employment of any black was ever terminated for racial reasons.
- that blacks have ever been excluded from any particular job category.

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[69] In the original complaint of the named plaintiffs there was an allegation of such discrimination, but it was not brought forward in the amended complaint and no evidence was offered by the plaintiffs in support of the original allegation.

- that there is any difference in the entry level salaries of blacks and whites; and
- that any black has ever been excluded from membership in any 4-H or extension homemaker club on account of race.

Additionally, several of the named plaintiffs disclaimed any discrimination in their answers to interrogatories and many who did testify seemed reluctant to charge overt discrimination on the part of the Extension Service. The claims that were asserted were frequently based on subjective "belief."

The propriety of considering such negative evidence has been recognized by the Fourth Circuit.

> We also think the absence of other evidence of discrimination should be considered in determining whether a prima facie case is made, just as the

presence of other evidence of discrimination should be considered in arriving at the same conclusion.

Roman v. ESB, Inc, 550 F.2d 1343, 1350 (4th Cir. 1976). See also, Allen v. Prince George's County, 538 F. Supp.833, 853 (D. Md. 1982).

The court has likewise been impressed with the conscientious dedication of the Extension Service officials to achieving its affirmative action goals. For instance the court has found persuasive the uncontradicted evidence

- that it began its efforts to rectify pre-existing disparities between the employment opportunities of blacks and whites prior to the enactment of the 1972 amendment to Title VII which brought the Extension Service within its coverage.

- that the Extension Service employs the largest percentage of blacks of any similar service in the country.
- that the average salaries of blacks in the Extension Service have been increasing at a greater rate than those of whites.
- that instead of abandoning its camping programs as so many other states did, the Extension Service desegregated its camps and strengthened its programs.
- that it required the black and white agents associations to merge; and
- that Extension Services in states with minuscule black populations have made less progress in achieving equal employment goals than has

> the defendant here according to one witness for the plaintiffs. (Tr. p. 6585).

It is appropriate to consider such evidence as counterbalancing evidence of that presented by plaintiffs as indicative of discrimination. Swing v. Pullman-Standard, 539 F.2d 77. 104 (5th Cir. 12976).

> Recent progressive improvements are highly relevant in determining whether the employer is currently discriminating against black persons. Such improvements can counterbalance evidence of old historical conditions.

Williams v. Yazoo Valley-Minter City Oil Mill, Inc., 459 F. Supp. 37, 52 (N.D. Miss. 1978). United States v. County of Fairfax, 629 F.2d 942 (4th Cir. 1980), cited and relied on by plaintiffs for the contrary proposition is clearly distinguishable.

Of course the Extension Service has been under no obligation to restructure its employment practices in order to maximize benefits for minorities. Furnco Construction Corporation v. Waters, 438 U.S. 567, 577-8 (1978) Nor does the fact that the methods it has employed to insure equality of employment opportunities may not have been the most productive ones available or that they may not have been administered most effectively constitute a violation of the law. Allen v. Prince George's County, 538 F.Supp. 833, 855 (D. Md. 1982).

In summary the court has found that while there was ample evidence of disparate treatment of blacks by the Extension Service prior to the enactment of the Civil Rights Act of 1964, since that time this defendant has made conscientious and successful efforts to eradicate the

effects of past discrimination; that it has at no time engaged in purposeful discrimination; and that plaintiffs have fallen far short of establishing by a preponderance of the evidence that defendant has engaged in pattern and practice of discrimination. So long as its present policies are maintained and put into practice the Extension Service should be allowed to continue the great work in which it is engaged without interference from the courts.

> It does not further the purposes of Title VII to find liability in a union which has seemingly complied with the Act's provisions since its enactment in 1965. We must carefully balance the need for effective enforcement of the Act against overzealous enforcement which can only lead to resentment and a resistance to change.

EEOC v. Local 14, International Union of Operating Engineers, 553 F.2d 251, 255 (2d Cir. 1977).

The Supreme Court has recently urged voluntary compliance by employers and employees with legal requirements in order to avoid the "often ponderous pace" of litigation of the type this case so painfully represents. Ford Motor Company v. EEOC, 50 U.S.L.W. 4937, 4939 (June 28, 1982). In a similar context this court had occasion to give like counsel to two of the parties in this case, the United States and the University of North Carolina, see State of North Carolina v. Department of Health, Education and Welfare, 480 F.Supp. 929 at 940 (E.D.N.C. 1979). The court now renews the hope that the parties here will govern themselves accordingly.

An order will enter dismissing the pattern and practice suit of the United States as plaintiff-intervenor. There remains the matter of the claims of the fifty-five individual plaintiffs, and these will be the subject of a separate memorandum of decision and order.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 20, 1982.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed August 20, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,

Plaintiffs,

AND

UNITED STATES OF AMERICA, et al.,

Plaintiff-Intervenors,

VS.

WILLIAM C. FRIDAY, et al,

Defendants.

ORDER OF DISMISSAL AS TO
CERTAIN INDIVIDUAL CLIAMS

In this employment discrimination action the defendants filed and served upon the fifty-five named plaintiffs on December 14, 1979 interrogatories in which

it was sought to have each plaintiff identify his or her specific individual claims and the basis for such claims of alleged racial discrimination by the North Carolina Agricultural Extension Service. Thereafter a motion to compel the individual plaintiffs who had not answered these interrogatories to answer them was filed, and at a hearing held on this motion before a United States Magistrate on December 15, 1980, counsel for the plaintiffs were requested to inquire of the individual plaintiffs who had not filed answers to the interrogatories as to whether they were interested in continuing to prosecute the action and suggesting that consideration be given to the dismissal of the action as to any party who did not care to prosecute the same further. On July 29, 1981, the court entered a further order directing plain-

tiffs to answer the interrogatories of the defendants, but at the time of the trial a number of them whose names are listed below had failed to do so.

James P. West

Roosevelt Lawrence

Eva L.Greens, Administratix of the Estate of Cleo Rich Greene

Warren Barnes

Cassius Williams

Samuel Taylor

Hoover M. Royals

Thelma Graves Turner Administratric of the Estate of J. A. Turner

Clarence Stockton

J. M. Spaulding

Joyce Hunter

On the authority of Roman v. ESB, Inc., 550 F.2d 1342, 1349 (4th Cir. 1976), it is now

ORDERED that the individual claims of the foregoing named plaintiffs be and the same are hereby dismissed with prejudice.

At the trial of this action which extended over a period of approximately ten weeks the plaintiffs whose names are listed below failed to appear and give testimony concerning their respective claims of discrimination.

Henry Revell

Chester Stocks

E.C. Short

Calvin Pargrave

Robert Lee Lancaster

Clifton Parker

Dorothy M. Hearns

Louise Penn Slade

Alma Hobbers

Inex Foster

George Koonce

Lloyd Peace

Marilyn Rich White

Mary Crawford

Elizabeth Ivey, Administratrix of the Estate of D. O. Ivey

Essie Moore

On behalf of these plaintiffs exhibits were offered showing salary comparison between them and certain white employees, but there was no evidence to show the

relative qualifications and job performances of these plaintiffs and those of the persons with whom they were sought to be compared, and this evidence standing alone was not sufficient to create a prima facie case of discrimination. The motion of the defendants to dismiss the individual claims of the foregoing plaintiffs must therefore be and is hereby allowed and the action as it relates to these named plaintiffs is dismissed with prejudice.

s/s

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

August 20, 1982.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed September 17, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,
Plaintiffs,
AND
UNITED STATES OF AMERICA, et al.,
Plaintiff-Intervenors,
VS.
WILLIAM C. FRIDAY, et al,
Defendants.

JUDGMENT

The individual claims of the named plaintiffs in this action having been considered and decided in a memorandum of decision this day filed, in accordance therewith it is now

ORDERED, ADJUDGED AND DECREED that all of the individual plaintiffs not heretofore dismissed by separate order including, but not by way of limitation, the plaintiffs named below, are not entitled to recover of the defendants, or either of them, by reason of any matter alleged in the complaint and the amended complaint filed herein:

P.E. Bazemore
James E. Wright
George E. McDaniel
Plese Corbett
Fred Belfield
W. N. Payton, Jr.
L. C. Coopler
Chester L.Bright
Johnnie Jones, III
Haywood E. Harrell
W. B. Waymer
Booker T. McNeill
Richard M. Edwards
L. D. Baldwin
Leroy James
Cliftono M. Grines
Avant P. Colemaqn
Percy W. Williams
W. C. Strowd
Fletcher Barber
R. E. Wilkins
J. J. Wallace
S. T. Lloyd
Hernando F. Palmer
W. F. Wright
Earl G. Swann
I. W. Murfree
Mary C. Martin
Martha B.Thomas
Ann Coston
Esther B. Roscoe
Minnie B. Taylor
Pennie P.Battle
Joann Fleming
Jeannette B. Sherrod
Carrie U. Lindsey
Geraldine H. Ray
Mary I. Parham
Deborah Jean Hart
Merhan Hinton
Bernie STaton
Marian Staton

and that the action be and the same is hereby dismissed as to all of the individual plaintiffs. Each side will bear its own costs.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

September 17, 1982.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Filed September 17, 1982 CIV. No. 2879

P. E. BAZEMORE, et al.,
Plaintiffs,

AND

UNITED STATES OF AMERICA, et al.,
Plaintiff-Intervenors,

VS.

WILLIAM C. FRIDAY, et al,
Defendants.

MEMORANDUM OF DECISION
(INDIVIDUAL CLAIMS)

In a memorandum of decision filed August 20, 1982 in this employment discrimination suit the court has found that the United States as plaintiff intervenor failed to establish by a

preponderance of the evidence that the defendants engaged in a pattern and practice of racial discrimination in employment and the provision of services in violation of 42 U.S.C. §§ 1981, 1983, 2000d, et seq., and 2000e, et seq. In that memorandum, reference to which is made for further background information, the discrimination claims of the individual

named plaintiffs were reserved for decision.[70] In this memorandum their claims will be separately considered.

> The district court's finding of an absence of class-wide discrimination is not necessar-

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[70] In the memorandum these were said to be fifty-five in number. Actually seventy-four plaintiffs were named in the caption of the original complaint of whom five were not identified in the body of the complaint. By separate orders all but forty-two of those named have been eliminated from the case. In addition there were a number of witnesses who appeared and gave testimony in support of the government's pattern and practice suit, and the statement in the previous memorandum at page 14 that no such witness appeared was in error. The confusion arose from the fact that defendants had directed interrogatories to these witnesses, and they were treated as named plaintiffs in the proposed findings of fact submitted following the trial. Had the government prevailed in its pattern and practice suit they would have been entitled to relief as members of the class, but in view of the failure of that suit the fact that they did not intervene in the action of the original named plaintiffs they are no longer entitled to have their individual claims considered. Dickerson v. United States Steel Corporation, 582 F.2d 827, 834 (3d Cir. 1978); Croker v. Boeing Company, 662 F.2d 975, 997 (3d Cir. 1981).

> ily inconsistent with a claim that discrete, isolated instances of discriminations occurred, for which the statistical evidence of a pattern of discrimination may have been lacking; there may have been sufficient evidence to establish a prima facie case of discrimination directed against specific employees. Therefore, the court's decision as to the class-wide claims of discrimination does not, as a matter of res judicata, bar class members from asserting individual claims of personal discrimination.

Dickerson v. United States Steel Corporation, 582 F.2d 827, 830-31 (3d Cir. 1978).[71]

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[71] In their original complaint the named plaintiffs asserted a number of claims of a class-wide nature such as discriminatory work assignments, testing, recruitment and hiring practices, provision of services and maintenance of segregated clubs. These claims have all been considered and rejected in the judgment dismissing the government's pattern and practice suit and will not be considered further here.

To the extent that these plaintiffs seek to ground their action on Title VII of the Civil Rights Act of 1964 they are met at the outset with the defense that all but seven of them failed to comply with the administrative remedy provisions of that Act.[72] While, nothing else appe-

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[72] The government filed its amended complaint alleging violations of Title VII in 1975 but the named plaintiffs did not file their amended complaint with similar allegations until November 30, 1981, one week before the trial. It simply alleged that seven of the named plaintiffs "Avant P. Coleman, Clifton M. Grimes, Mary C. Martin, Minnie B. Taylor, Fred Belfield, Jr., Henry Revell, Jr., and Chester Stocks, by and through their attorney, Cressie H. Thigpen, Jr., received a letter dated November 18, 1981, from the United States Department of Justice, Civil Rights Division, advising them of their right to institute an action in an appropriate United States District Court pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 §u.s.c. § 2000(e), et seq., within 90 days of receipt of the letter." There is nothing in the record to show that any of the other named plaintiffs filed charges with the EEOC or that they ever received right to sue letters.

aring, this failure to file timely charges with the EEOC and to obtain right to sue letters would seem to be fatal to the Title VII claims of the non-complying plaintiffs, United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844, 887 (4th Cir. 1979); Stebbins v. Nationwide Mutual Insurance Company, 382 F.2d 2167 (4th Cir. 1967); Lay v. Bethlehem Steel;, 542 F. Supp. 9 (D. Md. 1982), aff'd 681 F.2d 814 (4th Cir. 1982), the court has chosen to consider the claims of all plaintiffs

under their properly alleged causes of action grounded on 42 U.S.C. § 1981.[73] This statute provides in pertinent part that:

> All persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... and to the full and equal benefit of all laws and proceed-

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[73] It has now been established that the requirement of timely filing of a charge with the EEOC is not a jurisdictional prerequisite but is subject to equitable tolling, Zipes v. Trans World Airlines, Inc, ___ U.S. ___, 102 S.Ct. 1127 (1982); Walters v. Robert Bosch Corporation, ___ F.2d ___ (4th Cir., July 7, 1982), but the plaintiffs here offered no evidence to support a finding that the tolling doctrine should apply. In any event, since the claims of all plaintiffs are being considered under Section 1981, it is not necessary to address the issue. Similarly the question of whether those plaintiffs in a non-class action who have not complied with the administrative requirements of Title VII may rely on the compliance by other plaintiffs with substantially identical claims does not arise. See Dalton v. Employment Security Commission, 671 F.2d 835 (4th Cir. 1982); Allen v. United States Steel Corporation, 665 F.2d 689 (5th Cir. 1982); Crawford v. United States Steel Corporation, 660 F.2d 663 (5th Cir. 1981).

> ings for the security of persons and property as is enjoyed by white citizens. ...

It has now been established that in order to maintain a cause of action for racial discrimination in employment under this statute it is necessary for the plaintiff to allege and prove purposeful discrimination. General Building Contractors Association v. Pennsylvania, ___ U.S. ___, 50 U.S.L.W. 4975 (June 29, 1982).

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. ... It implies that the decision-maker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Resolution of the issue of intent depends largely on the credibility of the witnesses. Morrison v. Nissan Motor Company, Ltd., 601 F.2d 139 (4th Cir. 1979).

The initial burden on the plaintiff in an action grounded on racial discrimination in employment is to establish a prima facie case. This may be done by showing that the plaintiff belongs to a minority race and that he was qualified for an employment benefit which was denied him because of his race. The burden then shifts to the employer to articulate a legitimate non-discriminatory reason for the employment decision in question. This is not strictly speaking a burden of proof but is simply the burden of producing an explanation. Once this is done it is open to the plaintiff to show that an otherwise valid explanation advanced by the employer

is in fact a mere pretext for the action taken. The burden of persuasion remains with the plaintiff throughout to establish a violation of his employment rights. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The issue of pretext is essentially one of a state of mind, and ordinarily evidence bearing on the issue will be circumstantial in nature. Wright v. National Archives & Records Service, 609 F.2d 702, 716 (4th Cir. 1979).

While historical inequality of treatment of black workers may certainly be considered on the question of present discrimination, evidence of such standing alone does not suffice to establish a prima facic case. Furnco Construction Corporation v. Waters, 438 U.S. 567, 573-4 (1979). An employer must show that its employment decisions were based on

legitimate considerations, but he does not have to show that his hiring procedures were calculated to maximize the hiring of minority employees.[74] Id. at 577; and "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated by Congress they should not attempt it," id. at 578.

Where a black's objective qualifications are equal to those of a white aspirant to the same position the law does not require the employer to prefer the black over the white. Rather, the employer has the discretion to choose among equally qualified candidates so long

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[74] "[The employer's] decision to discharge Dr. Berkowitz may well have been an error in business judgment. However, the law does not prohibit a company making errors in its personnel decision, so long as it does not discriminate on the basis of age, race, gender, or religion." Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209, 1219 (E.D. Penn. 1982).

as the decision is not based on race. Texas Department of Community Affairs v. Burdine, supra, at 259.

Testimony of a plaintiff that he is qualified for a particular employment benefit is entitled to little weight. Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980; Lovelace v. Sherwin-Williams Company, ___ F.2d ___ (No. 80-179, 4th Cir., June 15, 1982)(Slip Opinion at 3).

With these principles in mind we turn now to a consideration of the claims of the named plaintiffs who remain in the action, all of whom are black. Their claims will be considered in the order that their names appear in the caption of the original complaint.

1. P.E. BAZEMORE.

Prior to his retirement in 1981 Mr. Bazemore was employed as an agricultural extension agent in Edgecombe County and

Union County for thirty years. He had a BS degree and had earned additional hours toward an advance degree. His areas of responsibility included cotton, swine, corn and grain sorghum. He claims that he was denied appointment as county extension chairman in Union County in 1976 on account of his race and that he also suffered discrimination with respect to his salary.

Bazemore was one of two applicants for the Union County position in 1976. The other candidate, M. C. Howell, was also a member of the Union County staff. The Extension Service conceded that Bazemore had provided leadership and had conducted good extension programs in the county through the years. His primary area of expertise was swine, and he operated his own swine farm. Howell had a BS degree and had been in charge of the

4-H program in Union County for eleven years. Following an interview by the Extension Service officials in Raleigh Howell was recommended for the Union County chairmanship. A fellow worker, also black, corroborated Bazemore's contention that he was competent to discharge the duties of county chairman in Union County. His tenure with the Extension Service was more than twice that of Howell.

The evidence showed that Howell had provided outstanding leadership in the 4-H program in Union County and that the program was regarded as the best one of its kind in North Carolina and one of the best in the nation. Howell was recognized nationally as an authority in 4-H volunteer leadership training and had served at the national 4-H center in Washington with responsibilities for training volunteer

leaders from other states' organizations. Almost all of the national 4-H winners from North Carolina in 1976 were from Union County.

In 1976 Howell had almost completed his work toward a master's degree in adult education, and he did obtain his degree thereafter. During his interview with the officials in Raleigh Bazemore was asked whether he would pursue his work toward a master's degree and he indicated that at that stage in his career he would not be interested in completing the work necessary to obtain a master's degree.

With respect to his salary claim it appeared that Bazemore was one of the highest paid agents employed by the Extension Service, and it was shown that in many instances he earned more than white agents with greater tenure and advanced degrees.

Assuming that Bazemore made out a prima facie case of racial discrimination, at least with respect to the failure of defendants to recommend him for the position of county chairman of Union County, the court is satisfied that in recommending M. C. Howell for the position the Extension Service simply made a choice between two qualified candidates and that there was no evidence to substantiate Bazemore's claim that the failure to recommend him was racially motivated. The fact is that the Extension Service three years earlier had suggested to Bazemore that he allow his name to be submitted for the county chairmanship in Montgomery County, and he declined to do so because he was already earning more money in Union County as an agent than he would have earned in Montgomery County as Chairman. As was shown in the previous memorandum

there was evidence that Bazemore was given preferential treatment with respect to his areas of responsibility in Union County. See page 23, footnote 15, of the memorandum of decision filed August 20, 1982.

The plaintiff Bazemore having failed to offer any evidence on the basis of which the court find that the reasons assigned by the Extension Service for the failure to recommend Bazemore for the county chairmanship of Union County and any possible salary discrepancies were pretextual, all of his claims of discrimination must be rejected.

2. JAMES E. WRIGHT.

The plaintiff Wright has been an agricultural extension agent in Hertford County for over thirty years. He alleges racial discrimination in his failure to be appointed as county extension chairman in that county when vacancies occurred in

1969 and 1979.[75] Wright also complained that he was discriminated against with respect to his salary.

In 1951 Wright received a BS degree in agricultural economics from A & T University, and since that time he has earned approximately twelve credits toward a master's degree. He taught vocational agriculture before joining the Extension Service in 1955. In 1962 he became the Negro county agent in Hertford County and assumed supervisory responsibilities over the Negro Extension Service in that county. His performance record with the Extension Service has been a very good one. He has received numerous awards including the Distinguished Service Award

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[75] With respect to the 1969 vacancy Wright testified that he did not apply for the position because he thought it would be futile to do so. For the reasons stated in the previous memorandum (pages 34-36) Wright's futility" claim was rejected.

for the National Association of County Agricultural Agents. He has held positions of leadership in various organizations associated with extension work.

In 1979 Wright was one of three applicants for the position of county extension chairman in Hertford County. The other two were James Doughtry and Billy Dunham, both white. Daughtry had been a member of the Extension Service staff in Hertford County prior to 1976, but at the time he applied for the chairmanship in 1979 he was employed by a bank. While a member of the Hertford staff there had been some friction between him and Wright over the location of some office furniture.

Dunham was an extension agent in Bladen County at the time that he applied for the chairmanship in Hertford, and while he had only a few years' experience

in the Extension Service, he had taught vocational agriculture in the public schools and had been the manager of a large farm equipment company in which position he supervised a large staff. In his first assignment with the Extension Service in Brunswick County he had taken a low productive agricultural program and turned it around within two years. He headed one of the most outstanding educational programs in the state. He had a reputation for relating well to people and was a good organizer who had received much commendation from his superiors.

Following the interviews conducted by the Extension Service officials in Raleigh Doughtry, who was the only one of the three candidates who had a master's degree, was eliminated. It was the court's impression that although Doughtry was considered to be well qualified for

the position of county chairman, in view of the friction which had existed among members of the Hertford County staff while Doughtry was employed there it would not have been prudent to return him to a position in that county.

The selection committee was thus left with two candidates, Wright who was black and Dunham who was white. Josephine Patterson, who is the district extension chairman of the northweastern district in which Hertford County is located, was one of the four members comprising the selection committee. She is black. After a full consideration of the relative qualifications of Wright and Dunham the selection committee voted unanimously to recommend Dunham to the county commissioners of Hertford County to fill the county chairmanship vacancy.[76]

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[76] The statement on page 34 of the previous

As early as September, 1979, at or about the time that vacancy in the county chairmanship occurred in Hertford Dr. Paul Dew, the assistant director for county operations of the Extension Service, had discussed the problem of friction among the member of the staff with the chairman of the county commissioners of Hertford who expressed some concern over the situation. Apparently it was the consensus of all concerned in the selection process that in view of Dunham's excellent qualification here was a chance to get an outsider to come into Hertford - "someone who had not been a party to ten years of

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memorandum of decision that James Wright was recommended for the position of county chairman in Hertford and rejected by the county commissioners in favor of a white was inaccurate. In fact both Wright and Billy Dunham were found by the Extension Service to be qualified for the position but only Dunham was recommended to the commissioners who thus were not called upon to consider Wright's candidacy.

internal strife" (Tr. 5701) - to straighten out the intrastaff problems relating to personality conflicts and communication difficulties. It was for this reason and not for any racially motivated reason that the selection committee for the Extension Service agreed unanimously to recommend Dunham for the position.

Wright's contention that Dunham's selection was racially motivated centers on his version of the facts relating to the events which transpired on the afternoon and evening of the day when Dunham was presented to the county commissioners for approval. According to him, he had been led to believe that he was the favored candidate and that he would be taken before the county commissioners at a meeting to be held on the evening of December 17, 1979 at the county courthouse in Winton. When Dr. Dew and

Mrs. Patterson arrived with Billy Dunham at the county extension office in Winton that afternoon Wright says that he had to excuse himself very shortly in order to fill a previous appointment and that he did not understand that Dunham was to be the the only candidate presented to the commissioners that night. Instead, he says that he was told by Mrs. Patterson that they would call him and tell him when to come down for the meeting. He says that he went home around 6:00 p.m. and took a nap only be informed by a telephone call from Patterson around 8 o'clock that night that Dunham had been presented to the commissioners and approved by them to fill the chairmanship vacancy effective February 1, 1980.

Both Dew and Patterson gave quite a different version of what transpired on that afternoon and evening. They say that

the purpose of their taking Dunham to the extension office that afternoon was to introduce him to the members of the staff, including Wright had he stayed around, and to inform them that Dunham would be presented to the commissioners that evening for approval as the new county chairman. The say that the purpose of calling Wright was to take Dunham by his home and introduce him that night since he had only met Dunham briefly that afternoon. Dew, Patterson and Dunham did in fact visit with Wright that evening at which time Dunham was very cordially received and Wright pledged him his full cooperation as a member of his staff.

The court was very favorably impressed with James Wright, and it is with regret that it is unable to credit his testimony in this respect. If he was subjected to the kind of treatment he

claims he received on that occasion, both Dew and Patterson were guilty of a most callous disregard of his feelings. Yet these two Extension Service officials came across as fair-minded individuals who would not have been guilty of such conduct, particularly in view of the fact that it would certainly have been counter-productive in their aims to rectify the longstanding internal friction problems with which the Hertford extension staff had been beset. Moreover, if the Dew and Patterson version of the events of December 17, 1979 is not correct, it would have been a simple matter for Wright to have brought one or more of the members of the Hertford staff to give their version of what transpired at their meeting with Dew, Patterson and Dunham that afternoon. No such witness appeared. The court also

considered it significant that neither Dew nor Patterson was subjected to any serious cross-examination on this subject.

We are left, then, with a situation in which two qualified candidates were considered to fill one position. The court is unable to say that the evidence proved either one to be more qualified than the other. Under these circumstances, absent a showing of racial motivation, it was open to the Extension Service to recommend either one of the candidates. No such showing has been made. The fact is that all of the evidence showed that James Wright has always been highly regarded by the officials in the Extension Service. For instance, in the early 1970's Wright was offered the opportunity to come to Raleigh, study for a master's degree and be given the position of specialist, a

more prestigious state level position than that of county chairman. Wright turned this offer down, and it was offered to another black who accepted and was given the specialist position. More recently when Dunham resigned the county chairmanship in Hertford County after having done "an extremely effective" job with respect to the program and achievement of staff harmony, Wright was recommended over two other applicants, one white and one black, for the position created by Dunham's resignation, and he was approved by the commissioners on June 7, 1982. On July 1, 1982, he assumed the duties of county chairman of Hertford County.

With respect to his salary claim Wright testified simply that he knew of no other white agent with the same or less

tenure and education than himself who was earning more money than he. This claim has not been substantiated.

In summary, even if it be assumed that the evidence sufficed to create a prima facie case of discrimination, the reasons advanced by the Extension Service for its failure to recommend him for the county chairmanship of Hertford County in 1979 were legitimate and reasonable, and plaintiff Wright has failed to produce evidence to show that these reasons were pretextual. His salary claim was not supported by evidence, and it follows that his claims of discrimination must be rejected.

3. GEORGE E. McDANIEL.

McDaniel was first employed by the Extension Service as Negro county agent in Jones County in late 1946, and he served there until 1949 when he moved to Wayne

County where he remained until his retirement in 1975. He held a BS degree from A & T and at the time of his retirement had approximately twenty-one hours of graduate work toward his master's degree. In 1972 he was one of eight applicants for the position of county chairman in Lenoir County, a position he alleges was denied him because of his race. He also alleges racial discrimination with respect to his salary.

Four of the eight applicants for the county chairmanship of Lenoir County, including McDaniel, were recommended by the Extension Service to the Lenoir County Board of Commissioners. W. S. Lamm, a white with twenty-one years of Extension Service experience and an MS degree, was selected over the other three candidates. Lamm's area of expertise was tobacco which is the principal crop in Wayne County.

Lamm has established a reputation for leadership by organizing the first agri-business council in Wayne County and the first young tobacco farmers association in North Carolina. McDaniel had six years more tenure than Lamm but only a BS degree and his areas of responsibility had included soybeans and dairying. His claim that he was better qualified for the position than Lamm has not been substantiated, but in any event the final selection was made by the county commissioners of Lenoir County and not the Extension Service, and there is no evidence to support McDaniel's claim that he was discriminated against on account of his race with respect to his failure to be appointed as county chairman in Lenoir County.

In support of his salary discrimination claim McDaniel offered evidence tending to show that there were white agents with less tenure who earned more than he did. Defendants, however, offered evidence tending to show that there were white agents with greater tenure who earned less than McDaniel. There was no evidence on the basis of which the court could compare the job performance of the various agents whose salaries were sought to be compared.

4. PLESE CORBETT.

Corbett graduated from A & T with a BS degree in 1938. Two years later he obtained a master's degree from the University of Massachusetts. He was employed by the Extension Service from November 16, 1940 until his retirement in

1973. He claims that because of his race he was discriminated against with respect to his salary.,

Corbett was employed in Alamance County, and although he had a twenty-five years of tenure at the time of the merger of the two branches of the Extension Service in 1965, he did not apply for the county chairmanship at that time. His area of responsibility included fruits and vegetables, soybeans, small grains and community resource development. Through the years he showed little interest in continuing and updating his expertise, and although continuing educational programs were available, during the last ten years of his service he only spent eleven days in such programs.

Corbett first complained about his salary in 1971 after his tenure qualified him for retirement, and as a result of his

complaints he received increases in his salary. Thereafter he made no more complaints concerning his salary prior to his retirement in 1973.

While a comparison of Corbett's salary with the salaries of various selected white agents tends to indicate some disparity, at least two of the white agents whose salaries were compared were county chairmen, and as previously noted this position carries a somewhat higher salary than that of agents. Also lacking is evidence from which a comparison of the job performances of the various agents with that of Corbett could be made.

The court is unable to find from a preponderance of the evidence that Corbett was the victim of racial discrimination with respect to his salary, and his claim must therefore be rejected.

C 5. FRED BELFIELD.

Belfield has been an agricultural and 4-H agent in Nash County for twenty years. He received a BS degree in agronomy at A & T in 1958 and a master's degree from NCSU in December 1977. He has supplemented his education by taking various other courses through the years. He alleges that he should have been selected to be county chairman in Northampton, Vance and Nash Counties when vacancies occurred in those counties; that he was unjustly reprimanded by the Extension Service for administering corporal punishment to an unruly 4-H camper; and that he has been discriminated against with respect to his salary, all on account of his race.

In 1974 Belfield was one of three applicants for the position of county chairman in Northampton County. The two

other applicants were white, one of whom had seventeen years' tenure in that county and a master's degree in animal husbandry and the other of whom had only seven years of experience and a BS in agronomy. The Extension Service recommended all three of the applicants to the Board of County Commissioners of Northampton County, and they selected the white candidate with the least tenure but whose areas of expertise, cotton and peanut, were best suited to the needs of that county. Since he was recommended for the position along with two other applicants it is hardly open to Belfield to content that he was the victim of racial discrimination on the part of the Extension Service with respect to his failure to be appointed to the position of county chairman of Northampton County. The selection made by the county commissioners of Northampton County appears to

have been based on legitimate considerations, but in any event the commissioners are not parties defendant to this suit.

The reprimand complained of arose out of an incident which occurred at one of the 4-H camps in June of 1978. Belfield was responsible for the Nash County contingent of 4-H campers that year. The evidence shows that he administered corporal punishment to an obstreperous camper under his supervision by striking him with a belt on one occasion and grabbing the boy by the arms and dragging and choking him on another. Although Belfield alleges that the Extension Service had no formal policy forbidding corporal punishment, the evidence showed that it was in fact the policy simply to dismiss an unruly child and send him home. The letter of reprimand for his error in judgment in inflicting corporal punishment

appears to have been justified. In any event, the evidence does not support a finding that the reprimand was racially motivated.

In 1980 Belfield was one of two applicants for the position of county extension chairman in Nash County. At that time he had nineteen years of experience in Nash County and had obtained his master's degree. The other applicant for the position, James Stephenson, had thirteen years of Extension Service experience about twelve of which had been in Nash County where he had conducted an outstanding tobacco program. Stephenson had also received a fellowship which permitted him to take additional courses to improve his technical knowledge in the field of tobacco, and he had been ranked in the first quartile for the previous five years. At the time he applied for

the vacant chairmanship position in Nash County Stephenson had been serving as county extension chairman in Vance County for fifteen months. At best the evidence simply shows that both the candidates were qualified for the Nash County position in 1980, and in the absence of any evidence showing that Stephenson was recommended over Belfield because of racial animus, Belfield's discrimination claim with respect to his failure to be appointed as county extension chairman in Nash County in 1980 must fail.

When James Stephenson returned to Nash county to accept the position of county extension chairman in 1980 it created a vacancy in the same position in Vance County for which Belfield again made application along with two other applicants, Phyllis Stainback and Donald Cobb. Stainback was a home economics agent with

twenty years of experience and a master's degree which Cobb had only five years of Extension Service experience and a master's degree in crop production. Cobb had received a fellowship to pursue additional studies in tobacco and had established the first integrated pest management program while serving as an Extension Service agent in Granville County. The evidence showed that Vance County required a county chairman with expertise in tobacco. Despite having less tenure than the other two applicants the Extension Service recommended Cobb for the position because of his expertise in tobacco and demonstrated leadership in all of his program responsibilities, and the recommendation was accepted by the Board of County Commissioners of Vance County.

There is no evidence to support Belfield's contention that the failure of the Extension Service to recommend him for the Nash and Vance County positions in 1980 was attributable to the reprimand which he received following the 4-H camp incident in 1978. Given the particular needs of the two counties, the evidence showed that in each instance the candidate selected had better qualifications for the position than did Belfield. The evidence of the defendants showing legitimate, non-discriminatory reasons for the selection of other candidates for these two positions has not been shown to be pretextual, and Belfield's claims with respect to the Nash and Vance County chairmanship appointments must fail.

With respect to his salary claim the evidence showed that Belfield compared his salary with that of a county extension

chairman and a specialist. Given the different responsibilities of these positions such comparisons do not prove a prima facie case of discrimination. Here again the evidence also failed to show that Belfield's performance was in any way better than that of the agents with whose salaries he sought to compare his own. In short, Belfield has failed to substantial his claim of salary discrimination and it must therefore be denied.

6. W. N. PAYTON, JR.

Payton, a 1938 graduate of A & T with a BS degree in agricultural education, taught vocational agriculture for six years prior to joining the Extension Service in 1944. He was employed in Jones County for two years and then moved to Lenoir County where he served until his retirement in 1975. In answer to interrogatories Payton assigned salary as his

only discrimination claim, but at the trial he testified that he applied for but was not selected as county extension chairman in Lenoir County in 1972 because of his race. The Extension Service has no record of any such application, but it does appear that when the vacancy occurred in Lenoir County in 1972 Payton was appointed as acting county chairman in which position he served for one month.

"As previously stated in the foregoing section dealing with the George McDaniel claim, there were eight applicants for the position of county chairman in Lenoir County in 1972 four of whom were recommended by the Extension Service to the county commissioners. Payton was not one recommended, but another black, McDaniel was recommended. The appointment went to W. S. Lamm, who was found by the commissioners to be the best qualified of

the candidates. Payton testified that he "felt" that he was equally as qualified for the position as was Lamm, but no other evidence supported this assertion. In short, Payton failed to substantiate his claim of discrimination in promotion.

With respect to his salary discrimination claim the evidence showed that Payton's salary was comparable to that of white agents who had appreciably less tenure. The evidence failed to prove that any disparity was predicated on race rather than performance, and it would be sheer speculation to find otherwise. All of Payton's claims are rejected.

7. L.C. COOPER.

A 1943 graduate of A & T with a BS de-gree in horticulture, L. C.Cooper served three years in the Air Force and then taught veterans vocational agriculture from 1947 to 1954 when he joined the

Extension Service in Wayne County. He has taken some graduate work at NCSU but has not received his master's degree. He alleges that the Extension Service discriminated against him with respect to the county chairman vacancy which occurred in Warren County in 1969 and also with respect to his salary.

Cooper transferred from Wayne County to Warren County in 1958 as supervisor for the agriculture Negro program there. In 1969 when a vacancy occurred in the position of county chairman of Warren County Cooper was asked in a luncheon meeting with the director of the Extension Service in Raleigh if he would consider applying for the vacancy. At the same time he was informed that a Mr. Hardage and another individual had also made an application for the position. Although the Extension Service highly recommended

Cooper for the position the Board of County Commissioners selected Hardage who, so the evidence showed, had more tenure and more administrative experience than Cooper.

Notwithstanding this setback the Extension Service continued to show an interest in Cooper and encouraged him to apply for a Kellogg fellowship at NCSU which was thereafter awarded to him so that he might enroll in a graduate program to earn his master's degree. Because of his low grades he eventually dropped out of the master's program but was nevertheless selected as county chairman of Warren County when the next vacancy occurred in 1979, a position which he held until his retirement in early 1982. The evidence falls far short of establishing that his failure to be appointed as county chairman

in Warren County in 1969 was in any way attributable to racial discrimination on the part of the Extension Service.

Cooper also claimed that his salary was inferior to that of white agents, but he offered no evidence to substantiate his claim. Instead, the evidence showed that there were several white agents with graduate degrees who became county chairman who earned less money than he did. Cooper's salary claim must also fail.

8. CHESTER L. BRIGHT.

This employee of the Extension Service graduate from A & T in 1938 with a BS degree in agriculture and science. Thereafter he took graduate courses at NCSU but never obtained a master's degree. he taught school from 1938 to 1943 and worked at a shipyard during World War II. He assumed a position with the Extension

Service in Beaufort County, North Carolina in 1949 which he held until the time of his retirement in 1975. He testified that "my allegation of discrimination is salary and advancement, or failure to have an opportunity to advance or get promotions."

At the time of the merger of the two branches of the Extension Service in 1965, Max Chesnutt, a white, was appointed to the position of county chairman in Beaufort County. Bright testified that he did not have an opportunity to apply for the position at that time, but there was no explanation as to why he was unable to apply. Unlike many of his co-plaintiffs, Bright did not testify that he was as well or better qualified for the position than Chesnutt. There was no evidence of racial discrimination against Bright in this connection.

With respect to his salary claim, it appeared that with the exception of Chesnutt, the county chairman, Bright was the highest paid agent in the county. The position of county chairman, of course, carried a higher salary than that of an agent, and there is no evidence to support this plaintiff's salary claim.

9. JOHNNIE JONES, III.

Jones was employed by the Extension Service in Greene County in 1971. The following year he transferred to Craven County where he was promoted to associate agent and given a salary raise. A year later he transferred to Durham County where he worked exclusively in urban 4-H" work under a black county chairman. In 1978 he transferred to Lenoir County to work as an agricultural agent. He claims racial discrimination in the areas of title promotion and salary.

In answer to the defendants' interrogatories Jones stated that he had been discriminated against with respect to a title promotion in 1978, but he made no reference to this in his trial testimony. Evidence for the defendants showed that Jones did apply for a promotion from associate to full agent in 1978 while he was still serving as a 4-H agent in Durham County, that his county extension chairman, also black, recommended the promotion but that a review of his program by the district chairman and other officials in Extension Service management revealed that his 4-H program were declining when compared with prior years and that his performance did not merit promotion. The court finds that the denial of the requested promotion was based upon Jones' substandard performance and not upon race. It was at that time that Jones abruptly

applied for the transfer to Lenoir County where he was allowed to switch from 4-H work to agriculture.

Jones' salary claim has already been the subject of a rather full discussion (see pages 44-47 of the previous memorandum of decision), and this discussion will not be repeated here. Suffice it to say that Jones sought to compare his salary with that of another agent who worked in a different field of responsibility in which he had a rare but much needed expertise and that it had been necessary for the Extension Service to pay him a higher salary than he was earning with the North Carolina Department of Agriculture in order to obtain his services in Lenoir County. Jones had failed to make a prima facie case of discrimination on either of his claims, and they will therefore be denied.

10. HAYWOOD E. HARRELL.

This employee joined the Extension Service in 1968 following his graduation from A & T with a BS degree in animal science. He was assigned to Halifax County where he worked for about six months before being drafted into the Army in which he served for nineteen months. He resumed his duties in Halifax County in 1971 and was assigned to do 4-H work. He testified that he felt he was discriminated against with respect to his salary relative to the salaries of comparable white agents.

At least some of the white agents whose salaries were thought by Harrell to be greater than his own were shown to have been making less than Harrell, and except for his own personal evaluation of his job performance which he described as "very good," there was no evidence from which

the court could make a comparison between his job performance and that of other agents. The defendants produced evidence, however, showing that Harrell had in fact been consistently placed in the third or fourth quartiles and that it had been necessary to give him special help in connection with his plan of work. Even so, it developed that Harrell is the second highest paid agent on the Halifax County staff and that the only agent earning more than Harrell has two more years of tenure.

This plaintiff has failed to make a prima facie case of salary discrimination, and his claim must therefore be denied.

11. W. B. WAYMER.

Waymer graduated from South Carolina State University in 1955 with a BS degree "in the principle of agriculture extension." After a period of service in the

military and in the Extension Service in Clemson, South Carolina he joined the Extension Service in this state in 1962. He spent four years in Wayne County and was then transferred to Mecklenburg County where he is still employed with areas of responsibility in energy resource development and housing. He testified that the trial that he believed he was being discriminated against with respect to his salary.

In 1976 Waymer used certain CETA trainees in his charge to paint a house which he owed. An investigation of the matter showed that he had accepted an illegal gift of the painting, and, admitting that he had made an error in judgment he repaid the appraised value of the gift He was given an oral reprimand which was in no way related to his race. He has rendered good service since that

time, and this is reflected in the fact that four years later he was making approximately $10,000 per year more than he was at the time of the incident.

The court is unable to find that Waymer presented a prima facie case for relief on any claim, and his claims must therefore be denied.

12. BOOKER T. McNEILL.

McNeill graduated from A & T with a BS degree in agriculture education in 1947, taught veterans classes in livestock and crop production for the Veterans Administration for four years and joined the Extension Service in1951 as an assistant Negro county agent in Wake County. Since 1954 he has been with the Extension Service in Cumberland County, and in 1972 he received his master's degree in agriculture education from A & T. He contends that although he did not

apply for the position of county chairman in Cumberland County in 1969 that he was as well or better qualified than the person who was appointed to the position. He also claims discrimination with respect to his salary.

In 1969 the Extension Service had not adopted a formal application procedure for filling county chairmanship vacancies, and potential candidates were informed of vacancies in many instances by word of mouth. They were asked by individual members of the Extension Service administration to apply for such positions. NcNeill along with two others was asked in 1969 if he would be interested in the position of county chairman for Cumberland County, and he said that he would. Thereafter Bruce Woodard, a white person,

was recommended to the county commissioners and by them accepted to fill the vacancy.

At the trial McNeill sought to bolster his claim of discrimination by calling as a rebuttal witness a former Cumberland County commissioner, E. J. Edge, who testified that it was his impression that the commissioners were told by the then district chairman that a master's degree was a prerequisite for the position of county chairman, but this evidence was refuted by testimony of the Extension Service officials. Admittedly Mr. Edge's recollection of events which had transpired twelve years prior to the time he gave his testimony was hazy, and the court is unable to credit his testimony concerning the events surrounding the selection of the county chairman in Cumberland County. That the Extension Service

harbored any racial animus toward McNeill would seem to have been completely negatived by its action in recommending McNeill for the county chairmanship in Cumberland County in 1976 when Woodard was chosen to assume the same position in Johnston County. McNeill has served as county chairman in Cumberland since 1976.

With respect to his salary claim the evidence showed that McNeill's salary was less than that of two agents who had earned their master's degree before he did. On the other hand defendants' salary comparisons showed that McNeill's salary was greater than that of several county chairman, some of whom had greater tenure in the Extension Service.

McNeill has failed to establish either of his claims by preponderance of the evidence, and they must therefore be denied.

13. RICHARD M. EDWARDS.

This employee graduated with a BS degree in agriculture education from A & T State University in Nashville, Tennessee in 1940. After teaching school for four years and helping his father on a farm he began work with the Extension Service in Bertie County where he spent the remaining thirty years of his employment before retiring on June 30, 1976. He claims that he was not given fair consideration for the position of county chairman in Martin County when that position came open in 1973 and that his salary was inferior to agents with similar tenure and education.

Edwards made application for the county chairmanship in Martin County in 1973 and was interviewed for the position, but he was not recommended to the board of commissioners. Neither was another applicant from the Martin County staff, P.

C. Bryant, whose qualifications were similar to those of Edwards. Later that year, however, Edwards was recommended for the position of acting county chairman in Martin County, a position which he accepted and held until early 1975.

The person eventually selected for the chairmanship in Martin, Leon Allen, had considerable experience in animal husbandry including experience as a specialist with the animal science department at NCSU. At that time Martin County had a growing livestock industry, and this was outside the area of Edwards' education, training and experience. Allen had a master's degree in animal husbandry.

Edwards had a problem with alcohol in the mid-1960's which caused him to have himself committed to an alcoholic treatment center at Butner, North Carolina. He stayed there only a short time, and there

was no evidence to rebut his testimony to the effect that he had been completely cured. There was evidence on the part of the defendants indicating that he lacked leadership qualities, a contension which, of course, Edwards disputed.

If, as Edwards contends, he was the victim of racial discrimination in the failure to recommend him for the county chairmanship of Martin County in 1973 when he was nearing retirement age, it is difficult to understand why such a discriminatory animus would not have resulted in the selection of a white to fill the position of acting county chairman of Martin County for a period of some eighteen or more months. Be this as it may, the court finds that the selection of Allen to fill that vacancy was based on legitimate, non-discriminatory reasons,

and Edwards has failed to establish even a prima facie case of racial discrimination in this regard.

His salary claim is likewise without merit. While he was able to produce evidence showing that some white agents with the same degree and less tenure earned more money than he did, he failed to show that his salary was not commensurate with his job performance as compared with those agents who made more money. Defendants also submitted evidence showing that there were white agricultural agents with greater tenure who earned less money than Edwards. His salary claim must also be dismissed.

14. L. D. BALDWIN.

Baldwin graduated A & T in 1949 with a BS degree in agricultural education. He has taken no formal graduate courses but did take numerous in-service courses. He

was first employed by the Extension Service in 1950 in Edgecombe and in the following year he was transferred to Franklin County where he served until the time of his retirement in 1979. He claims discrimination in job assignments and salary.

Upon his transfer to Franklin County Baldwin requested that he be assigned tobacco responsibilities but instead was given corn, CRD, 4-H and horticulture crops. He expressed displeasure with the CRD assignment, but the evidence showed this to be one of the four program components in extension work, and it is regarded as of the same or similar importance as the other three program areas. It further appeared that the majority of county extension chairmen are

assigned CRD responsibilities. Baldwin's claim of inferior work assignments was not substantiated.

Baldwin's claim of salary discrimination must also fail. The evidence based on a comparison of his salary with that of two white agricultural agents showed that in fact Baldwin had greater tenure and earned more money than these agents. In fact at the time of his retirement he was the highest paid agent in Franklin County excluding the county extension chairman. Baldwin's claims will be dismissed.

15. LEROY JAMES.

Leroy James holds a BS degree in animal husbandry from A & T which he received in 1957 and a master's degree in agricultural education awarded by the same institution in 1971. He has also done graduate work at NCSU and a number of in-service courses. He was first employed

as an assistant Negro county agricultural agent in Wayne County in 1958, and he transferred to Pitt County in 1961.

A vacancy in the county chairmanship in Pitt County occurred in 1965 following the merger of the two branches of the Extension Service, but James did not apply for the position at that time. The claim of the United States as plaintiff-intervenor that James' failure to apply was based on "futility" grounds has previously been rejected. See previous memorandum of decision at page. 35.

In 1976 James again applied for the position of county chairman, this time in Johnston County. He was recommended to the board of county commissioners along with two other agents for that position, but the commissioners selected Bruce Woodard, who at that time was serving as county chairman in Cumberland County, to

fill the vacancy. The evidence showed that Woodard was highly qualified for the position and there was no evidence to show that the failure to appoint James was in any way racially motivated.

The following year another vacancy in the county chairmanship of Pitt County occurred, and James was the only applicant recommended for this position by the Extension Service. He was accepted by the Board of County Commissioners of Pitt County and assumed the position shortly thereafter which he still holds. Far from indicating that James was the victim of discrimination it seemed to the court that at almost every turn James was given full if not indeed preferential treatment by the Extension Service. The court finds no discrimination with respect to James' opportunities and eventual promotions within the system.

While James failed to testify concerning any discrimination with respect to his salary, the salaries of various other agents and county chairmen were submitted for comparison with his own. While some of these comparisons showed that agents with similar degrees and tenure While earned more money that James in a given year, others showed that James earned more money than agents with greater tenure. The salary comparisons do not reflect the relative job performances of any of the agents. Explanations for any apparent discrepancies in the salaries of various agents and the named plaintiffs herein have been set forth more fully in the previous memorandum of decision and will not be repeated here.

In summary, James had failed to show that he has been the subject of discrimination in respect to any of the claims advanced by him in this action.

16. CLIFTON M. GRIMES.

Grimes graduated from A & T in 1954 with a BS degree in agricultural education, and he received a master's degree from the same institution in 1965. He served three years in the Air Force following his first graduation, and he was first employed by the Extension Service in September of 1959 in Bertie County. He transferred to Gates County in 1965 as an assistant Negro agricultural agent. In 1970 he applied for the position of county extension chairman in Gates County, and he alleges racial discrimination in his failure to receive the appointment. He also claims salary discrimination.

There were two candidates for the position of county chairman of Gates County in 1970, Grimes who was black and Talmadge Baker who was white. The Extension Service recommended each of the two candidates to the county commissioners of Gates and they selected Baker. Therefore Baker declined to accept the position, and it was thus left open again with Grimes as the only known candidate.

About this time the district chairman became aware that Grimes was having trouble with his personal financial affairs which had manifested itself in the giving of checks on his account which contained insufficient funds, a misdemeanor under North Carolina law. This matter was brought to the attention of the Extension Service officials in Raleigh, and it was determined that this development afforded sufficient reason for

withdrawing the Service's previous recommendation of Grimes to fill the position in Gates County for which he had applied. Except for his financial difficulties and the possible adverse effects his writing of bad checks might have on the image sought to be maintained by the Extension Service the evidence showed that Grimes was as congenial, courteous, cooperative worker who worked well with the clientele in the county. His performance evaluations had been high.

Based on this evidence the court finds that Grimes has presented a prima facie case of discrimination on the part of the Extension Service. After withdrawing his name the position remained open and the Extension Service continued to solicit applications from other extension agents. The burden of going forward and articulating some legitimate non-dis-

criminatory reasons for its actions was thereupon shifted to the Extension Service.

In discharging this burden the de-fendant showed that in spite of Grimes' positive working performance, he had had trouble managing his financial affairs and that he had a reputation for writing bad checks and for failing to settle his accounts on a prompt basis. Grimes conceded at trial that he had given checks which had been returned for insufficient funds. He had been told that as soon as he cleared up his financial problems that he would again be considered for a promotion, but as late as the time of the trial which was more than ten years after his rejection for the county chairmanship of Gates County Grimes was continuing to give bad checks. All of this had a direct

effect on his reputation in the community and his leadership and management abilities.

The person selected to fill the vacancy in Gates County in 1970, Zackie Harrell, did not have the required seven years of prior experience to become a county chairman, but he did have previous experience in the management of one of the largest farm operations in the state and the management and operation of a peanut-buying company.

In an effort to show that the reasons assigned by the Extension Service for withdrawing its recommendation of Grimes were pretextual the plaintiff called as a witness Mr.John Baggett, a banker from Gates County. Mr. Baggett testified that he had never heard of any instance when Grimes failed eventually to meet his obligations, and he stated that in his

opinion Mr. Grimes had a good reputation in the community both as an individual and as an extension agent. He further testified that notwithstanding Grimes had continued to give bad checks through the years and was slow in paying many of his obligations to the bank, that he would continue to make loans to Grimes. The case is a close one, but the court is unable to find from a preponderance of the evidence that the actions of the Extension Service in this instance were racially motivated. After all, an employer is not well served by an employee who continually violates the laws of the state even in such comparatively innocuous matters as writing bad checks. Although he was given an opportunity to get his financial house in order almost twelve years ago, Grimes apparently has not done so and would not be qualified for the position of county

chairman in Gates County if a vacancy should occur at this time. His claim of discrimintion with respect to the handling of his application for the county chairmanship of Gates in 1970 must be rejected.

Grimes' salary claim is based on a comparison of his salary with that of the county chairman, Zackie Harrell, from 1971 to the present time. As we have seen, given the difference in the responsibilities of extension agents and county chairmen such a comparison is not probative of discrimination. Also, the defendants presented salary comparisons which showed that Grimes earned more money than many white agents who had greater tenure. His salary claim must also be rejected.

17. AVANT P. COLEMAN.

Coleman received a BS degree in agricultural education from A & T in 1960, and in 1978 he received a master's of science degree in adult education and sociology at NCSU. He entered the employment of the Extension Service on September 1, 1962, and has been so employed in Wilson County since that time. Since 1968 he has been assigned to 4-H and CRD responsibilities, and at the present he works primarily with 4-H clubs including community project and special interest clubs. He is a member of the city council of Wilson. He claims discrimination with respect to his salary.

Coleman sought to prove his claim by comparing his salary with certain white employees of the Extension Service, one of whom was the county chairman. As we have seen, because of their greater responsi-

bilities county chairmen earn more than agents, and disparities between the salaries of the two groups do not support a finding of discrimination. Coleman also testified that he earns less than a home economics agent in the county, Patricia Edwards. The evidence showed, however, that Edwards has received widespread recognition for establishing homemaker clubs and that while Coleman's 4-H program in 1973 was judged to be one of the best in the state, it has suffered a sharp decline since that time with more than a two-thirds drop in membership in the clubs. This decline has coincided roughly with the period in which Coleman has been a member of the Wilkson city council. Although the Extension Service encourages agent involvement in nonpartisan community activities, the impression was gained that Coleman's involvement in political and

city council work has affected his performance as an Extension Service agent and that his present salary which is in excess of $20,000 per year is commensurate with his performance.

Coleman's claim of salary discrimination will be denied.

18. PERCY W. WILLIAMS.

Williams is a 1951 graduate of A & T in agriculture. He has taken some graduate work at A & T and NCSU since that time but has not obtained a master's degree. After teaching veterans farming for three years following his graduation Williams was employed by the Extension Service in the fall of 1954 in Wilson County. He transferred to Pasquotank County in 1957. His remaining complaint in the case is salary discrimination.

The evidence showed that Williams earned less money than two white agents who had similar degrees and less tenure, but the evidence for the defendant showed that Williams earned more money than some agents with greater tenure and master's degrees. There was no evidence from which the court could compare the job performance records of Williams with those agents who earned more money. His salary discrimination claim remains unsubstantiated, and it will therefore be denied.

19. W. C. STROWD.

Following his graduation from A & T in 1941 with a BS degree in agriculture Strowd worked as director of farm husbandry at a farm and vocational school in Pennsylvania for about two and a half years. He returned to North Carolina and became employed by the Extension Service in Perquimans County in 1944 as Negro

emergency war food production assistant. Strowd claims discrimination in the failure of the Extension Service to have him appointed county chairman in Perquimans County in 1969.

Strowd says that he expressed an interest in this position but was discouraged from applying by the departing county chairman who is alleged to have told him that he would be contacted by the Extension Service if it wanted to support his candidacy. At that time Strowd was the senior agent in Perquimans County with twenty-five years of experience. The evidence showed, however, that Strowd lacked initiative, drive and leadership qualities considered necessary to be a county extension chairman. On the other hand the evidence for the defendants showed that the person selected for the position, Richard Bryant, was well

qualified for the position and had demonstrated the requisite leadership qualities in Gates County where he has been the county extension chairman. The court finds that the selection of Bryant was predicated on his prior administrative experience and leadership rather than any racially discriminatory animus on the part of the Extension Service.

With respect to his salary claim Strowd's attempted comparison of his salary with that of the county chairman, for reasons previously stated, is without probative force. Similarly, the evidence tending to show that Strowd earned less money than some white agents with less tenure must be discounted for that Strowd failed to present any evidence showing the relative qualifications and job performances of the other agents.

All of Strowd's claims of discrimination will be denied.

20. FLETCHER L. BARBER.

Barber graduated from A & T with a BS degree in agricultural education in 1949. Later he took some post-graduate work but did not obtain a master's degree. Following college he taught school for one year and joined the Extension Service in Jones County in 1950. After serving two years in the Army he returned to the Extension Service in 1954 where he served until his retirement in August of 1981. He alleges discrimination in the failure to appoint him as county chairman of Jones County in 1978.

Barber and two others applied for the position, and each of them was interviewed by the Extension Service officials in Raleigh. Of the three applicants Minton Small received the recommendation of the

Extension Service, and he was appointed to fill the vacancy in Jones County by the county commissioners.

Central to Barber's claim is his contention that he was better qualified for the position than Small. The evidence failed to substantiate this claim. While Small's tenure with the Extension Service was only thirteen years as compared to Barber's twenty-five years, Small had a master's degree, with a specialist in tobacco and had served as county extension chairman of Caswell County for four years before applying for the Jones County position. While Small's quartile rankings had been low for several years, and his performance as county chairman of Caswell had been criticized by one of the black agents in that county, the evidence for the defendants showed that he had in fact performed creditably in his Caswell County

duties. In view of the fact that tobacco is the principal money crop grown in Jones County which had prompted the commissioners of that county to request that the county chairmanship vacancy be filled by one with expertise in tobacco, the decision of the Extension Service to recommend Small for the position was fully justified. The evidence will not support a finding that this decision was racially motivated.

Accordingly, Barber's claim must fail.

21. R. E. WILKINS.

Wilkins, a 1948 graduate of A & T with a BS degree in agriculture, was first employed by the Extension Service in Duplin County in April 1948. He served approximately thirty years, retiring in

1977. Questioned as to the nature of his complaint of discrimination Wilkins testified:

> I think it was not being given an assignment. From '65 until '70, I worked mostly with the other agents. I had no area of responsibility of my own until '69 - until '68, I believe - '65 to '68.

Wilkins testified that he complained about his work assignments in 1967 and that in 1968 he was given sole responsibility as "corn agent."

Evidence further showed that Wilkins had a complaint about his 4-H responsibilities, but the evidence showed that this complaint was resolved by mutual agreement of the county chairman and the other agents involved.

With respect to his salary claim Wilkins testified that he thought in view of his tenure that his salary was "terribly low." While he did not know of any

whites with less tenure who were making more money than he, salary comparisons were introduced in support of his salary claim. This evidence showed that Wilkins earned less than several other white agricultural agents with less tenure, but there was no evidence from which a comparison of his job performance with that of the other agents could be made. Evidence for the defendants showed that Wilkins earned more money than several other agricultural extension agents with greater education and tenure.

Wilkins has failed to prove his claims by a preponderance of the evidence, and they will be denied.

22. J. H. WALLACE.

Judy Herring Wallace graduated from Shaw University in 1965 with a BS in home economics. She began work with the Extension Service on January 1, 1966 in

Columbus County and on September 1 of that year she transferred to Duplin County where she has since been stationed. Questioned by her counsel as to why she joined as a plaintiff in this action she replied that "I felt there was some discrimination as it relates to pay - my pay."

She further testified that her curiosity had been aroused when she received a salary increase in 1971 at a time of the year when raises were not expected to be granted. She had no personal knowledge of what others in her organization were making, and salary comparisons offered in evidence on her behalf failed to substantiate her claim of salary discrimination. As in the cases of her co-plaintiffs previously discussed, there may have been instances in which agents with similar educational back-

grounds and less tenure were making more money than Wallace, but again the defendants submitted the names of several white home economics agents with greater tenure who were earning less than Wallace.

There was also a question on the part of this plaintiff that she was discriminated against with respect to some of her work assignments, but this claim was a part of the situation referred to in the foregoing section of this memorandum dealing with the plaintiff, R. E. Wilkins, and as noted there, all of such claims were resolved amicably to the satisfaction of all concerned. The court considered the claims of Judy Wallace to be devoid of merit, and they will be denied.

23. S. T. LLOYD.

Lloyd was a 1944 graduate of A & T with a BS in agriculture. He took some graduate work at Cornell University but

did not receive a master's degree. He was first employed by the Extension Service in Union County. In September of 1954 he transferred to Granville County where he remained until his retirement in June, 1975. He claims discrimination in his failure to be appointed county chairman in Granville County in 1971 and in his salary.

Lloyd testified that he did not apply for the position of county chairman in Granville County in 1971 because he didn't think he would be appointed - that he "didn't think that they would appoint a Negro as county chairman at that time." He testified that he believed he was better qualified for the position that the white person who was appointed and that he had approximately three years more tenure than the appointee. Except for his subjective feelings that he probably would not have

been appointed and that he was as well or better qualified for the position than the person who was appointed, there was no evidence whatever to substantive a claim of racial discrimination with respect to this claim. Lloyd's futility claim has previously been rejected (see memorandum filed August 20, 1982 at pages 34-36), but even if the court had accepted Lloyd's "futility" testimony at face value, it would still have been incumbent upon him to establish his qualifications for the position of county chairman of Grenville County in 1971. This he did not do.

With respect to his salary claim, the evidence showed that two of Lloyd's co-plaintiffs, Mary I. Parham and I. W. Murfree, were also employed by the Extension Service in Granville County and that although each of them had less tenure than Lloyd, each was being paid more than

he was. It also appeared that the white agent whose salary was sought to be compared with Lloyd's was making more than a $1,000 a year less than Lloyd at the time of the latter's retirement in 1975.

Lloyd's claim are without merit and will be denied.

24. HERMANDO F. PALMER.

Palmer entered A & T in the fall of 1939 and was enrolled there through the spring of 1943 when he dropped out to take a defense job in the Norfolk Navy Yard following which he served two and a half years in the United States Army Air Corps. He re-entered A & T in the fall of 1946 and graduated with a bachelor's degree in agricultural education in the spring of 1947. He thereafter took graduate courses finally obtaining his master's degree in 1977. He joined the Extension Service in 1955 in Bertie County, transferring to

Johnston County on April 1, 1959 at which time he was promoted from assistant agent to full agricultural agent. He complains that he was not appointed county extension chairman in Johnston County when a vacancy occurred there in 1976 and that a fellow agent, a white, earned more than he.

When the vacancy occurred in the chairmanship in Johnston County in 1976 there were eight applications for the position including Palmer's. The board of commissioners requested that the Extension Service submit three applicants to them for interview, and the Extension Service submitted the names of Frank Baker, white, Leroy James, black, and Bruce Woodard, white. Woodard was chosen by the commissioners to fill the position. A comparison of Woodard's qualifications with those of Palmer showed that each had twenty years of experience with the Extension

Service; that Palmer had passed off thirty hours toward his MS degree while Woodard already had his masters; that Woodard had demonstrated leadership as the county extension chairman in Cumberland County for seven years prior to making application for the position in Johnston; and that Woodard had been recognized by the county commissioners of Cumberland County for outstanding service.

In addition to Palmer's self appraisal of his qualifications a member of the board of commissioners of Johnston County testified that Palmer had a good reputation in the community and as an agricultural agent. Commissioner Holding confirmed that the commissioners exercised their own judgment in these matters and that the idea of limiting the applicants to be interviewed to three was that of the commissioners.

The court can find no inference of racial discrimination arising from this evidence. After all, one of the applicants whose name was submitted to the commissioners of Johnston was black, and although he was not selected to fill the position in Johnston, he thereafter applied for and was appointed to the position of county chairman in Pitt County.

The agent whose salary was sought to be compared with Palmer's is now deceased. When he died Palmer became the highest paid agent in Johnston County. It appeared that the deceased agent had been a specialist in horticulture and that because of the scarcity of such agents they normally commanded higher salaries than other agents.

Palmer's claims of discrimination were not substantiated by the evidence, and they will be denied.

25. W. F. WRIGHT.

W. F. Wright graduated from A & T in 1940 with a BS in vocational agriculture. He served in the Army until 1945 and assumed a position with the Extension Service as assistant county agent for Negro work in Edgecombe County in 1946. He was employed in Richmond County from 1946 to 1951 and he served in Nash County from 1951 to the date of his retirement in December of 1973. He attended graduate school at Cornell University in the summer sessions of 1950 and 1953. During the 1960's he was admitted to graduate school at NCSU to pursue a master's degree in adult and community college education, but he did not complete the work for that degree. He claims that he was discrimi-

nated against in connection with the filling of the county chairmanship vacancy in Nash County in 1972 and also with respect to his salary.

Wright claims that notwithstanding he was working in the same office with the county chairman in Nash County in 1972 that he did not become aware that there would be a vacancy in the chairmanship until he received notice that it had been filled by another. This so-called "futility" claims has been previously rejected as incredible. See memorandum of decision filed August 20, 1982 at pages 34-35. Even so, the only evidence that Wright was as well or better qualified for the position than the person who was named to fill it was his own subjective opinion. The successful applicant for the position, William Shackelford, was shown by the defendants to have had eighteen years'

experience with the Extension Service and a master's degree at the time of his appointment. The evidence showed that he was fully qualified for the position, and Wright's claim that he should have been appointed instead is without merit.

Wright's salary claim is predicated largely upon the theory that had he been appointed county chairman in 1972 he would have made more money. This, of course, is true, but it does not form the basis for a valid claim of salary discrimination. Wright's salary claim has not been substantiated, and it must therefore be denied.

26. EARL G. SWANN.

Swann graduated from A & T with a BS degree in agricultural education in 1949. Thereafter he took a few graduate courses but did not obtain a graduate degree. He entered the employment of the Extension

Service in 1956 and has served in Wayne, Robeson and Alamance Counties. He claims discrimination in the selection of a county chairman to fill a vacancy in Alamance County in 1975.

Questioned by his counsel as to why he did not apply for the position in 1975 Swann replied:

> I had a feeling - this is within myself. And I had noticed so many other black people being denied with more education that I had. So I guess I just said, "I am defeated to begin with." And I did not apply.

He went on to testify that in view of the fact that he was only one year short of reaching full retirement that he would not be interested in a county chairman's position at this time. The evidence would not support a finding that Swann has a legitimate "futility" claim or that his

failure to be appointed as county chairman in Alamance County in 1975 was in any way racially motivated.

With respect to his salary claim Swann cited an instance in Robeson County many years ago in which he was told by a county commissioner that a white agent with comparable qualifications was making $80 a year more than Swann. Swann offered no evidence to show that his qualifications and job performance record were any better than that of comparable white agents. In reputation of Swann's charges of discrimination against blacks defendants offered evidence to show that the highest paid staff member in Alamance County is a black home economics agent.

Swann had failed to prove any of his claims by a preponderance of the evidence, and accordingly they will all be denied.

27. I. W. MURFREE.

Iley Wiley Murfree graduated from Delaware State College, a land grant institution, with a BS degree in agricultural education in 1950. He thereafter took some graduate courses but did not obtain a graduate degree. He was first employed by the Extension Service before transferring to Granville County in October of 1962. He claims that he was wrongfully denied the county chairmanship in Granville County, a position for which he applied in 1976. He also claims discrimination with respect to his salary.

When the vacancy in the county chairmanship in Granville County in 1976 there were to applicants for the position, Murfree and Dorothy Wilkinson, both of whom were agents in the county. Wilkinson was white and had a longer tenure than Murfree. Each of the candidates was

interviewed by the Extension Service following which Grover Dobbins the district extension chairman, recommended to the Board of County Commissioners of Granville County that Murfree be appointed to fill the position. The minutes of the meetings of the commissioners do not reflect this recommendation, but it is not denied that in any event it was made at an informal meeting of Dobbins with the commissioners at which time it was indicated that his recommendation would be accepted and that Murfree would be appointed to fill the vacancy. Shortly thereafter the chairman of the commissioners called Dobbins and told him that upon further consideration it had been decided not to approve Murfree and Dobbins was requested to readvertise the position.

In an effort to convince the commissioners that Murfree was indeed qualified

to fill the position the Extension Service requested that he be appointed as acting chairman until a permanent chairman could be selected, and this appointment was tendered to and accepted by Murfree who served as acting chairman thereafter for a period of approximately nine months. Further efforts to win over the commissioners and obtain the appointment of Murfree as permanent county chairman were unavailing, and the position was finally filled by Frank Baker, whose qualifications for the position were beyond question.

Just how this state of affairs could be construed as an act of racial discrimination on the part of the Extension Service is somewhat baffling to say the least. The fact is that in answer to the defendants' interrogatories Murfree himself disclaimed any discrimination on

the part of the Extension Service, but the apparently had a change of heart after the case reached the trial stage and he took the stand to testify.Be these things as they may, a review of all of the testimony of each witness who testified concerning this aspect of Murfree's claim fails to reveal any evidence which can reasonably be said to substantiate a claim of racial discrimination on the part of the Extension Service.

Similarly Murfree's claim of salary discrimination is without evidentiary support. The evidence showed that in fact he earned more than several agents who had greater tenure. Certain salary comparison exhibits offered on his behalf are not persuasive since there is no evidence reflecting the relative job performances of the agents involved.

All of Murfree's claims are denied.

28. MARY C. MARTIN.

This plaintiff received a BS degree in home economics from A & T in 1949 and a master of science degree in clothing and textiles from the University of North Carolina at Greensboro in 1978. From 1949 to 1960 she was employed principally as a home economics teacher in the public schools of Georgia, South Carolina and North Carolina. She entered the employment of the Extension Service as a home economics extension agent in Mecklenburg County, North Carolina in 1960. She claims that on account of her race she has been repeatedly harassed by Phil Haas, the county extension chairman in Mecklenburg, and that she had been discriminated against with respect to her salary.

The evidence showed that Martin has been embroiled in controversy throughout her tenure with the Extension Service.

She has been placed on probation on two separate occasions and counseled for her poor job performance, and although she has created some successful programs in the field of home economics, she has failed to dispel the unfavorable impressions created by her other actions. For instance, in 1978 show wrote a letter on Extension Service stationery soliciting funds from private businesses for the construction of an extension homemaker center. She took this action without the knowledge or consent of the Extension Homemakers Council or the Extension Service. This unauthorized action had to be countermanded by the Extension Service. This action and additional complaints received by the Extension Service regarding Martin's poor preparation and inferior teaching methods resulted in her being placed on probation. Another source of

complaint with Martin's performance was her action in charging a fee in connection with certain extension courses which she was teaching at Central Piedmont Community College. As a result of these things Martin was placed in a counseling program under Lois Brown, a black district program leader in home economics.

Martin attributes many of her difficulties to personality differences with county chairman Haas, but her conclusory allegations of discrimination on the part of Haas may not be attributed to the Extension Service or to Mecklenburg County which is also a named defendant in this case absent any evidence that either of the defendants condoned or participated in any alleged discrimination.

Martin's claim of harassment on account of her race has not been substantiated by the evidence, and her less than

adequate job performance explains any salary disparities which may exist between her and other agents with comparable tenure, education and responsibilities.

All of Martin's claims will be denied.

29. MARTHA B. THOMAS.

Plaintiff Thomas was graduated from Alcorn A & M University in 1963 with a BS degree in home economics education. She received her master's degree from NCSU in 1978. She was first employed by the Mississippi Cooperative Extension Service for seven years, moving to North Carolina where she accepted employment with the Extension Service here in Wayne County in 1970. She claims discrimination in her salary.

She sought to prove this claim by comparing her salary with that of one Evelyn Raper, a white home economics agent

in Wayne County. The evidence showed that while there was some small difference in the salaries of these two agents, Raper had fifteen years of continuous service with the Extension Service and had taught home economics in Wayne County for four years before beginning her employment with the Extension Service. Additionally, it appeared that Thomas had received a letter of reprimand for failure to get in certain required reports on time.

The evidence submitted on behalf of this employee fell far short of making out a prima facie case of discrimination in salary, and her claim must therefore be denied.

30. ANN COSTON.

AT the trial this plaintiff gave her name as Annie P. Costan Gilmer. A 1970 graduate in home economics from North Carolina central University, Gilmer was

employed by the Extension Service in Pasquotank County from February, 1970, until December 31, 1973, when she resigned. She gave as the reason for her resignation that she did not feel that her salary was commensurate with her skills and job performance, and she based her claim on salary discrimination on the admitted disparity of about $1,200 between her salary and that of a white home economics agent in Pasquotank who had only about a year or so of greater tenure.

Evidence for the defendants showed that while employed by the Extension Service Mrs. Gilmer suffered a personal tragedy in her family when her husband was killed in an accident and that this sharply affected her work. The white agent whose salary was compared with that of Gilmer's was shown to have been performing very effectively during all of

this period. There was no evidence from which the court could infer that the salary disparity in this instance was in any way attributable to racial discrimination, and this plaintiff's claim must therefore be rejected.

31. ESTHER B. ROSCOE.

At the trial this plaintiff testified that her present name is Esther B. Roscoe Winston. She is a 1943 graduate in home economics from Shaw University. After teaching school for three years she joined the Extension Service in 1946 and was continuously so employed until the time of her retirement in 1976. She claimed that she was not permitted to pursue in-service training in 1970 while a white agent was in summer school, and she also complained about her salary.

With respect to the in-service training claim plaintiff's recollection was haze, and the district agent who testified for the Extension Service could not remember a problem arising concerning this plaintiff's in-service training.

Plaintiffs's salary claim was based primarily on her contention that she felt that she had to do more work than her white counterparts. The evidence showed that Winston earned less than some agents with similar degrees and less tenure but also earned more than some white agents who had advanced degrees or greater tenure. There was no evidence as to the relative job performance of the agent whose salaries were compared.

This plaintiff's claim were not substantiated by a preponderance of the evidence, and each of them must therefore be rejected.

32. MINNIE B. TAYLOR.

Plaintiff Taylor graduated from Bennett College with a BS degree in home economics in 1945. After teaching home economics in the public schools for three years she entered the employment of the Extension Service in July, 1949, and remained so employed until the time of her retirement in1979. Her testimony dealt mainly with the matter of club segregation which has been covered in the previous memorandum of decision, but on her own behalf there is a claim that she was not considered for the county chairmanship in Perquimans County when a vacancy occurred in 1970 and that she was not adequately compensated for her services.

With respect to the county chairmanship vacancy the evidence showed that Taylor in fact sponsored one of her co-plaintiffs, W. C. Strowd, for the

position and did not apply for it herself. While the evidence showed that Taylor had received certain awards, citations and honors for her work, it failed to show that she possessed the qualities of leadership and administrative abilities needed to quqalify her for the position of county chairman. This claim which has been advanced on her behalf is without merit.

Plaintiff Taylor testified that in her opinion her job performance was superior to that of a white home economics agent in Perquimans County, but it also appeared that Taylor earned more money than the white agent. The comparison sought to be made between Taylor's salary and that of home economics agents in other counties were not considered relevant. Not only did the evidence fail to show that the responsibilities and job perform-

ances of the agents in other counties may have been different than those of Taylor, as we have been, salaries of agents in all areas of responsibility varied sharply between the various counties.

All of Taylor's discrimination claims will be denied.

33. PENNIE P. BATTLE.

Plaintiff Battle graduated from Virginia State College with a BS degree in home economics, and her first employment was with the Virginia Extension Service in 1936. She was employed by the North Carolina Extension Service from 1940 to 1946, and after an absence of two years she remained there until her retirement in 1974. She claims that she was not made acting county chairman in 1970 and that she was discriminated against with respect to her salary.

Battle testified that the usual extension practice was to appoint an acting county chairman to serve until the vacancy could be filled by a permanent appointment, but she concedes that she did not seek the position of acting county chairman in 1970. Except for her seniority there was no evidence tending to establish her qualifications to fill the position if she had applied for it.

With respect to her salary claim Battle offered comparisons of her salary with the salaries of certain white home economics agents, but the only comparison considered of any significance by the court was the one which compared Battle's salary with that of the other home economics agent in the same county, Mary G. Cowper, a white. Although Cowper's

tenure almost equaled that of Battle, the evidence showed that Battle always earned more than Cowper.

34. JOANN FLEMING.

The married name of this plaintiff is now Joann Fleming Carter. She received a BS degree in home economics education from A & T in 1969 and since that time she has taken advanced courses at NCSU. She entered the employment of the Extension Service on January 11, 1971, and joined as a plaintiff in this suit ten months later because she believed that one of the white agents with less tenure than she had a higher salary.

The white agent whose salary was believed by this plaintiff to be greater than hers while she was employed in Craven County was in fact shown by the evidence to have been earning approximately $1,400 per year less than this plaintiff. The

white agent in Guilford County whose salary was believed by Carter to be greater than hers was in fact shown by the evidence to have earned a master's degree; that in some years her salary was more than Carter's while in others Carter earned more. Even after receiving her master's degree the white agent made only $240 more per year than did Carter.

There is no semblance of merit in this plaintiff's claim.

35. JEANNETT B. SHERROD.

Plaintiff Sherrod received her BS degree in home economics at North Carolina College at Durhan in 1954, taught school for about six years and entered the employment of the Extension Service in Richmond County in April, 1960. After being on pregnancy leave for fifteen months she re-entered the employment of the Extension Service in Union County on

February 1, 1962. At the time of the trial she had just successfully completed work on her master's degree. She claims discriminatory in pay.

Here again the evidence showed that in some instances Sherrod made less than some white agents with less tenure but that Sherrod made more than other white agents with similar tenure. Evidence was lacking as to the relative job performances of the agents whose salaries were compared, but there was evidence that some of the white agents involved had master's degrees and extensive experience as teachers and public school nutritionists prior to joining the Extension Service.

The court is unable to find by a preponderance of the evidence that plaintiff Sherrod has been the victim of discrimination with respect to her salary, and her claim is therefore denied.

36. CARRIE U.LINDSEY.

The married name of this plaintiff is Carrie Lindsey Thompson. She received a bachelor of science degree in home economics education in 1970 from North Carolina Central University, and she has twelve semester hours of graduate work from NCSU in family economics and adult education. While she was a student at North Carolina Central she was recruited for a position with the Extension Service by the district extension chairman, Mrs. Josephine Patterson. She began work in 1970 and transferred in 1972 from Northampton County to Washington County where she is still employed. She testified that she became a plaintiff in this action because of certain working conditions in Northampton County, but her evidence failed to substantiate a claim of any discrimination against her personally by

the Extension Service. In fact she makes no such personal claim with respect to her salary or other conditions of her employment.

The condition of which she complained in Northampton County was that a white secretary typed only for white 4-H agents but not for black agents. She also said that she had personality differences with another agent in that county.

That the Extension Service bears no racial animus toward this plaintiff is perhaps best evidenced by the fact that when a vacancy occurred in the county chairmanship in Washington County in November of 1981 plaintiff Thompson was asked by the Extension Service if she were interested in applying for the position. She declined to do so but was made acting

county extension chairman, the position to which she was still serving at the termination of the trial.

Plaintiff Thompson has failed to prove a case of racial discrimination against the Extension Service.

37. GERALDINE H. RAY.

This plaintiff was a 1969 graduate in home economics from A & T, and she was thereafter employed by the Extension Service in Sampson County until 1971. She then entered graduate school in the University of North Carolina at Greensboro, worked parttime with the Extension Service at A & T and obtained her master's degree in 1925. In 1980 she entered VPI in Blacksburg, Virginia to work on her doctorate.

The principal complaint of this plaintiff was that because of her race she was assigned inferior office facilities

while employed in Sampson County. This claim has heretofore been dismissed as "patently frivolous" and will not be discussed further here. See memorandum of decision filed August 20, 1982, page 39, footnote 29.

With respect to a possible salary claim the evidence showed that while Ray earned less than some agents, she earned more than others who had less tenure. Evidence of her relative job performance was lacking.

All of this plaintiff's claims will be dismissed.

38. MARY I. PARHAM.

Plaintiff Parham graduated from Bennett College in 1940 with a BS degree in home economics. She was the first black agent to be employed by the Extension Service in Granville County. She

worked there until the date of her retirement in 1975. She claims salary discrimination.

Parham testified that in the 1950's a district agent told her that her salary and the salaries of many of her black colleagues were inferior to those of their white counterparts. She undertook to compare her own salary with that of one Dorothy Wilkinson, a white home economics agent, but it appeared that although Wilkinson had a master's degree her salary was only slightly larger than that of Parham. There was no evidence that Parham's job performance was better than that of Wilkinson. Defendants' salary comparisons showed that Parham's salary was greater than that of several white home economics agents, and that in 1971 Parham's salary was in fact higher than

that of any white agent on the staff in Grenville County being exceeded only by that of two black agents.

Parham's claim of salary discrimination has not been sustained.

39. DEBORAH JEAN HART.

40. HERMAN HINTON.

41. BERNICE STATON.

42. MARIAN STATON.

These four named plaintiffs are minors who were represented by their fathers and next friends, James Hart, James Hinton and James Staton. They were alleged to be members of 4-H clubs. Neither they nor their parents appeared as witnesses at the trial, and the only evidence offered on their behalf was that relating to the segregation of 4-H clubs, a subject which has been previously dealt with in the memorandum of decision filed

August 20, 1982. For the reasons there stated the claims of these plaintiffs are dismissed.

CONCLUSION

The individual claims of the forty-two named plaintiffs remaining in the suit have now been carefully considered and found to be wanting in merit sufficient to support a recovery in each instance.[77] For the benefit of the parties some additional observations may be in order.

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[77] The claim of each plaintiff has been considered as if it were a separate lawsuit, and the testimony of each named plaintiff has been reviewed in its entirety together with all other testimonial and exhibit evidence bearing on each individual claim. In addition to the facts found therein the court adopts as its own all uncontested facts set forth in the proposed findings of fact of the parties as indicated under the "red, blue, yellow" system of marking described in the previous memorandum.

While many of the individual claims were not without some semblance of merit, the court was impressed with the fact that many of the plaintiffs disclaimed any discrimination in their answers to interrogatories and showed some reluctance to testify against their employer. The majority of them are still employed by the Extension Service, are doing good work and seem happy in their employment. There was no suggestion that any reprisal or retaliatory action was ever taken against anyone for having joined as a plaintiff in this suit. Contrary to the usual case involving charges of racial discrimination there was no evidence of any overt act of discrimination or any of the usual badges of discrimination such as the use of racial slurs and the like.

All of this serves to reinforce the court's impression that the employment practices of the Extension Service donot differ appreciably from those of the great university system of which the Extension Service is a part. We are dealing with white collar employment at an advanced educational level, and the system is being administered by true professionals whose sole objective is the delivery of the highest quality of services to the people of North Carolina - an objective shared by the true professionals, including the plaintiffs in this action, who constitute the work force necessary to the accomplishment of Extension Service aims. There was not the slightest suggestion in the evidence that the employment decisions of the Extension Service administrators have

not been made and implemented in the best of faith and completely free of any racial bias or prejudice.

Because of its contractual relationships with the one hundred different counties in the state the Extension Service has not always been able to have the last word in employment decisions. And the court is not at all sure that the non-discrimination policies of the Extension Service have been fully shared by each of the boards of county commissioners with which the Extension Service had had to deal.[78] These people are elected

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[78] A prime example of this was seen in the case of I. W. Murfree in Grenville County (named plaintiff No. 27). It will be recalled that after first accepting the recommendation of the Extension Service that Murfree be appointed as county chairman, the commissioners reconsidered and asked the Extension Service to withdraw his name. Not shown by the record but judicially noticed from other proceedings in this court is the fact that Granville is the home of the nationally known activist in racial causes, Ben

officials who may normally be expected to respond to the will of their constituencies, and as regrettable in North Carolina but throughout the nation. Unfortunately, perhaps, only three of the one hundred counties were made parties defendant to this suit, and the court was thus deprived of the benefit of evidence which discovery might have produced had the other counties been made parties.[79]

Chavis, and the county was the scene of bitter racial strife and turmoil in the 60's and early 70's. Admittedly the decision posed for the white commissioners of the county by Murfree's nomination was not an enviable one. Grenville was not one of the three counties made parties defendant to this suit.

[79] This is in no way intended as criticism of the three different sets of attorneys who have represented these plaintiffs at different times during its long history. All of them have shown exceptional ability in this area of the law. It does point up the fact, however, that when a group of plaintiffs as large as the one here involved (seventy-four in number) undertake to prosecute a suit based on the statewide employment practices of one defendant with a hundred separate co-

The evidence shows, however, that the Extension Service itself has endeavored assiduously to comply with the law and where disparities in the conditions of employment have been shown to exist, it has continued to take prompt steps to eradicate them. The court again expresses the hope that the parties to this suit will continue to work together in a spirit of cooperation, cordiality and good will to the end that their mutual aim of bringing a better life to all people in North Carolina may be achieved.

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employees, the litigation not only becomes unwieldly but is indeed virtually unmanageable both for the attorneys and the court.

A judgment order will be entered dismissing the claims of the individual plaintiffs.

s/s
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

September 17, 1982.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-873

P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D. BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES; HOOVER M. ROYALS; THELMA GRAVES TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M. MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND

ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Appellants

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR., Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

No. 82-1881

P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D.

BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; FLETCHER BARBER; R. E. WILKINS; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES, HOOVER M. ROAYSL; THELMA GRAVES TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M. MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Appellants

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR., Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

No. 82-1927

P. E. BAZEMORE; JAMES E. P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. BWRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; D. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D. BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES; HOOVER M. ROYALS; THELMA GRAVES

TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M. MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Plaintiffs

and

THE UNITED STATES OF AMERICA,

Appellant

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR.,

Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

No. 82-2065

P. E. BAZEMORE; JAMES E. WRIGHT; GEORGE E. McDANIEL; PLESE CORBETT; CALVIN HARGRAVE; FRED BELFIELD, JR.; W. N. PAYTON, JR.; L. C. COOPER; CHESTER L. BRIGHT; JOHNNIE JONES, III; LLOYD L. PEACE; JAMES P. WEST; E. C. SHORT; HAYWOOD E. HARRELL; L. B. WAYMER; ROOSEVELT LAWRENCE; BOOKER T. McNEILL; RICHARD M. EDWARDS; L. D. BALDWIN; LEROY JAMES; ROBERT L. LANCASTER; HENRY REVELL, JR.; CLIFTON M. GRIMES; CHESTER STOCKS; AVANT P. COLEMAN; PERCY W. WILLIAMS; W. C. STROUD; ELIZABETH IVEY, Administratrix of the Estate of D. O. Ivey, deceased; CASSIUS S. WILLIAMS; SAMUEL TAYLOR; J. H. WALLACE; EVA L. GREENE, Administratrix of the Estate of Cleo Rich Greene; WARREN G. BARNES; HOOVER M. ROYALS; THELMA GRAVES TURNER, Administratrix of the Estate of J. A. Turner; S. T. LLOYD; HERNANDO F. PALMER; CLIFTON PARKER; W. F. WRIGHT; CLARENCE STOCKTON; EARL G. SWANN; I. W. MURFREE; J. M. SPAULDING; MARY C. MARTIN; ALMA C. HOBBS; MARTHA B. THOMAS; ANN COSTON; ESTHER B. ROSCOE; MINNIE B. TAYLOR; JO ANN FLEMING; JEANETTE B. SHERRAD; INEZ W. FOSTER; CARRIE U. LINDSEY; GERALDINE H. RAY; MARY I. PARHAM; DIANNE STANLEY and DOROTHY M.

MOBLEY; LOUISE P. SLADE; MARILYN WHITE; PENNIE P. BATTLE; JOYCE P. HUNTER, on their own behalf and on the behalf of all others similarly situated; TIMOTHY BAZEMORE; EDDIE WATFORD; WILLIE RYAN; ALICE BALLANCE and HERBERT WHITE, on their own behalf, etc.; MARY B. CRAWFORD AND ESSIE MOORE, on their own behalf, etc.; DEBORAH JEAN HART, by her father & n/F, James Hart; HERMAN HINTON, by his father & n/f, James Hinton; BERNICE STATON and MARIAN STATON, by their father & n/f, JAMES STATON, on their own behalf and on behalf of all others similarly situated; THE UNITED STATES OF AMERICA, JOHN R. BLACK, Secretary of Agriculture; DR. MARY NELL GREENWOOD, Deputy Director, Sicence & Ed. Administration-Extension,

Plaintiffs

and

THE UNITED STATES OF AMERICA

Appellant

v.

WILLIAM C. FRIDAY, Present of Consolidated University of North Carolina; JOHN T. CALDWELL, Chanceloor of North Carolina State University; GEORGE HYATT, JR., Director of North Carolina Agricultural Extension Service; THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; THE UNIVERSITY OF NORTH CAROLINA, a body politic and corporate; and CRAWFORD AMICK, HASSELL THIGPEN and JAMES G. MARTIN, County

Commissioners, on their behalf and on behalf of all others similarly situated,

Appellees

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge. (C/A 2879)

Argued April 13, 1983
Decided December 10, 1984

Before WIDENER and PHILLIPS, Circuit Judges, and KELLAM, Senior District Judge*

David B. Marblestone (Walter W. Barnett, Burton Craige, Department of Justice; William Bradford Reynolds, Assistant Attorney General; Charles J. Cooper, Deputy Assistant Attorney General, on brief) for Appellant United States; Eric Schnapper (Jack Greenberg, O. Peter Sherwood; Edward D. Reibman, Cressie H. Thigpen, Jr., Thigpen, Blue & Stephens, on brief) for Appellants P. E. Bazemore, et al; Howard E. Manning, Howard E. Manning, Jr. (Manning, Fulton & Skinner; Millard R. Rich, Assistant Attorney General, on brief) for Appellees.

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* United States District Court for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

This is a race discrimination case in which the individual plaintiffs and the United States appeal from the judgment of the district court which rejected their claims of discrimination by the North Carolina Agricultural Extension Service.[1]

The case was filed in 1971 based on alleged violations of the First, Fifth and Fourteenth Amendments to the Constitution, 4 U.S.C. §§1981 and 1983; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq (prohibiting discrimination in programs receiving federal funds); and 7 U.S.C. §341 et seq (funding authority of the United States Department of Agricul-

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[1] The Extension Service is administratively a part of North Carolina State University, whose chancellor and the Assistant Dean/Director of the Extension Service are also appellees. In addition, the President of the University of North Carolina system, William C. Friday, the Board of Governors of UNC, and Alamance, Edgecombe, and Mecklenburg Counties are appellees.

ture). The United States intervened on the same causes of action. The complaints were both subsequently amended to incorporate alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq (employment discrimination).

After a ten week trial, the district court rendered its decision in two separate opinions issued August 20 and September 17, 1982. In addition to an opinion on the broad aspects of the case such as the pattern and practice claims, the district court, by a separate opinion and order, dealt with and disposed of the individual claims.

On appeal, the individual appellants challenge the rejection of class certification and of their individual claims of race discrimination in their salaries and in the selection of County Extension Chairmen. They also challenge the

district court's refusal to order the integration of the local 4-H clubs and Extension Homemaker clubs. The government and the individual appellants argue that the district court improperly concluded that a pattern or pratice of racial discrimination was not proved with respect to the salaries of county-level employees and State Specialists, or with respect to the selection of the County Chairmen. In addition, they claim that the district court improperly concluded that the Extension Service quartile system, used for merit pay and promotion evaluations, was valid. We affirm.

The district court made extensive factual findings regarding the structure and practice of the Extension Service, so only a brief review of the facts pertinent to the claims on appeal is necessary.

The Extension Service is a division of the School of Agricultural and Life

Sciences of North Carolina State University (NCSU) at Raleigh. Upper level administrative positions in the Extension Service are faculty appointments in the School. At the county level, a County Extension Chairman (County Chairman) is in charge of each county's Extension Service office. In addition to substantive responsibilities among the Service's four program areas (agriculture, home economics, 4-H, and community resource development), he oversees the county's overall extension program and manages county professional staff. The staff consists of assistant, associate, and full agents, who provide services in the program areas. Actual tasks are determined by each county's specific needs based on primary crops, geography, population, etc. Above the county level, a District Extension Chairman is responsible for the overall administration of the several counties

within his district. He is in regular contact with the county professional staff and participates in performance reviews biannually. The Extension Service also has 12 District Program Leaders (responsible for one program in 2 districts) and approximately 25 State Specialists (essentially researchers in particular subjects, such as soybeans, cattle, horticulture, adult education), who are available to assist county staff members with specific programs. Many of the State Specialists work at NCSU in Raleigh.

When a vacancy exists for a County Chairman position, it is noted in the Extension Service monthly announcements. Applicants who meet objective requirements (experiene and education) are interviewed separately by the Director of the Extension Service, his Associate Director, the Assistant Director for County Operations, and the relevant District Extension

Chairman. The group then meets and makes a recommendation on the appointment to the Board of County Commissioners where the vacancy exists. Under a Memorandum of Understanding in effect between the Extension Service anud the counties of North Carolina, the county Boards have authority to reject Extension Service recommendations.

The Extension Service has been in existence since long before the passage of the Civil Rights Act of 1964. Prior to 1965 it was divided into two branches, a white branch and a Negro branch. Both branches reported ultimately to the Director of the Extension Service. On August 1, 1965 (shortly after the effective date of the 1964 Civil Rights Act), the two branches were merged into a single organization. Salary disparities which had existed between the two branches were not immediately eliminated. By 1972,

however, when public employers such as the Extension Service were required to comply with Title VII,[2] it had already been operating on a nondiscriminatory basis for about 6 years. Some pre-existing salary disparities continued to linger on nevertheless.

Since the merger, the Extension Service has set the minimum starting salary for all new county level agents. A salary differential is paid for a master's degree, prior relevant experience, and special skills. Once in the employ of a particular county office, however, each agent's salary is affected by a number of factors, not all within the control of the Extension Service. Each county contributes differing percentages of its local extension agents' salaries, ranging from a

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[2] P.L. 92-261 modified the definition of "person" in Title VII to include governments and governmental agencies as of March 24, 1972.

low of 18% in Camden county to a high of 57% in Forsyth County. The balance of agents' salaries is a combination of state and federal funds, paid by the Extension Service. Both the counties and the state legislature subsequently determine pay increases by their contributions to the salaries, sometimes in the form of a flat sum to each employee, sometimes as percentage raises. There is no uniform procedure for pay increases, and there are not always annual occurrences. In addition to regular salary increases, the State and about 10 counties provide funds for merit pay increases,[3] which are

[3] The United States notes that the distict court, based on the findings of fact submitted by the defendants, found that some counties designate which agent is to receive a merit increase out of its funds. The United States argues this statement is not supported by the evidence, and while the fact that a county designating which agent is to receive an increase is not generally accurate, the fact that counties do give increases to their own agents is amply supported by the record. We have, however, come across one incident in which

awarded based on the past year's job performance. The exact amount is determined by the amount of merit funds available in each county and the agents' job performance during the previous year, as measured by their performance according to the Extension Service quartile system and the Performance Review Guide. Increases to keep more senior employees' salaries above inflationary increases of entry level salaries are set by the Extension Service and also come out of merit funds. Thus, wide variations among salaries can and do develop with the passage of time.[4]

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a county raised its County Chairman's pay in order to keep him from moving elsewhere, and another where a county increased the pay of an agent who was acting county chairman pending selection of a permanent replacement.

[4] For example, County Chairmen salaries in 1971 ranged from $11,601 (Dare County) to $16,588 (Wake County), and similar disparities persist.

Under the quartile system, each employee is placed in one of four quartile groups annually by the District Extension Chairman. Placement is based upon an evaluation of the employee, using the Performance Review Guide. Under that system, employees of like grade and experience are placed in the first, second, third or fourth quartile according to their relative performance during the previous evaluation period, so that an employee in the first quartile has, in general terms, performed better than one in the second quartile, etc. Within each quartile, there is no ranking, however. The Performance Review Guide measures the performance of each employee against goals and objectives and performance of duties called for in his job description. The evaluation under the guide takes into account the observations of the County and District Extension Chairmen, program

leaders and specialists. It also includes an interview or interviews with the agent himself who is required to sign the evaluation made of him according to the Performance Review Guide.

The Extension Service-sponsored local 4-H and Extension Homemaker clubs are established on a wholly voluntary basis at the community level. The Extension Service requires each club to be organized without regard to race and to certify that its membership is open to all races. Although voluntary membership may result in single-race clubs, all activities above the local community level are conducted on an integrated basis (including summer camps and area acitvities). The Extension Service provides services to local clubs equally, regardless of their racial makeup.

We proceed to the specific issues raised on appeal. Our review of the

district court's findings of fact is subject to the clearly erroneous rule. FRCP 52(a); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

A. Class Certification

In the district court the claims for class certification were quite broad, embracing a wide variety of alleged wrongs, which could have been based on race, in the operation of the Extension Service. On appeal, however, the claims have been somewhat narrowed and are that the district court erred in its refusal to certify classes consisting of: (1) all black employees of ... [the Extension Service] on or after November 18, 1971; (2) all black members and potential members of ... [the 4-H and Extension Homemaker Clubs] on or after November 18, 1971; and (3) all County Commissioners in North Carolina who held that position on

or after November 18, 1971. The first two classes mentioned are classes of plaintiffs, and the last a class of defendants.

In arriving at our conclusions, we have had the benefit of, and have taken into account, the findings of the district court at trial, for the plaintiffs pressed the question of class certification from time to time throughout the proceeding as late as argument of the case on the merits. This is not always, or even usually, the case, for the certification of classes at earlier times during a proceeding is many times required and should be as early as practicable. FRCP 23(c)(1). In this connection, we note that the intervention of the government in the case, asserting its broad pattern or practice claims which would have required relief as broadly based as the claimed plaintiffs' classes would have received, made it possible for the plaintiffs to

introduce all evidence they would have been able to introduce had the classes been certified. All the questions on the merits were also presented to the court which would have been presented had the classes been certified. Thus, in a practical sense at least, even if not in a technical one, the complaint on appeal on account of failure of class certification may seem to be of little moment or was made moot by the intervention of the government.

The class of employees seeks to litigate the legality of Extension Service service to single race clubs, the existence of salary discrimination against black employees, and the existence of discrimination in the selection of employees for the position of County Chairmen. While it is doubtful that the legality of Extension Service services to single race clubs is a proper subject of

class representation by employees not members of the clubs, Hill v. Western Electric, 596 F.2d 99 (4th Cir. 1979), it is discussed on its merits at the end of this opinion. The district court declined to certify the class of employees because there was no evidence that there existed any other potential class members, in addition to the named plaintiffs, who had been subjected to any alleged discriminatory employment practices of the defendants. While this finding is not clearly erroneous, it is qualified, as the district court found, by the fact that other witnesses testified on behalf of the pattern or practice claims who would have been members of the class had the pattern or practice claims succeeded. Thus, alone, it may not be sufficient to sustain the district court's ruling on that point.

An alternate reason for denying the class certification of the employees given

by the district court was the lack of typicality of their claims under FRCP 23(a)(3). The salaries paid to the employees are made up from federal monies which are not in question here, appropriations from the state legislature, and the county governments involved. Increases are either across-the-board, merit, or percentage increases and one county in North Carolina has nothing whatsoever to do with the amount of increase given by another county. Thus, the claim of a potential plaintiff against one county will not be typical of the claim of another potential plaintiff against a different county. The same reasoning applies to the selection of the position of the county Chairman. That selection is subject to approval of the county involved, and the fact that one county may discriminate in the selection of its county chairman has nothing to do with

whether another county discriminates. Thus, we feel that the claims are not typical in the sense that they should support a class certification and are nearly like those asserted in Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980), in which we held that promotion and pay decisions subject to almost complete local autonomy in the various offices of Southern Bell throughout North Carolina would not support the typicality requirement under FRCP 23(a)(3) for a statewide class of employees.

The second class of black members and potential members of the 4-H and Extension Homemaker Clubs was not certified as a class because the district court found there was no evidence that anyone was denied services or provided inferior services because of their race; neither, it found, was there any evidence that any black female had been denied membership in

any Extension Homemaker Club or had been denied services or provided inferior services because of her race. The district court further found that in only one case had a black child been denied membership in a 4-H club because of his race, and this resulted in the prompt removal of the offending volunteer worker by the Extension Service. The court found there was no evidence whatever that any other black child was ever denied membership in a 4-H Club, or denied 4-H Club services, or provided inferior services by the Extension Service. It thus denied certification of the class. The plaintiffs do not take exception either to the findings of fact of the district court or to its conclusion that the class should not have been certified on the basis relied upon by that court. They say, however, that the district court misunderstood the issue, which is not whether "all

white clubs reject black applicants on account of race, but what affirmative steps, if any ..., the Extension Service must require as a condition of state services and materials." Parenthetically, no issue is made of "materials" as contrasted to "services." The plaintiffs' statement of their proposition shows the flaw in their claim. While we do not think their present characterization of the issue is correct, but that the district court correctly defined the issue, even if the claim is properly made, it is at once apparent that if there has been no denial of membership or services on account of race, there has been no legally cognizable wrong.

The plaintiffs take exception to the district court's ruling that, under General Telephone Company v. EEOC, 446 U.S. 38 (1980), class action certification is inappropriate and unnecessary in

pattern and practice suits brought by the EEOC and the government. We do not find it necessary and we do not pass upon the correctness of that ruling for the reasons stated just above, which we repeate for emphasis. The government's intervention in this case asserting its broad pattern and practice claims enabled the plaintiffs to have the benefit in the case of all the evidence they would have been able to introduce had their classes been certified. The relief sought by the government was also as broad as that asked for by the plaintiffs. The questions presented were as broad. Thus, the district court's alternate ruling that class certification was unncessary and inappropriate in a pattern or practice case has no practical efect of any kind on the outcome of this case, and we think the resolution of that question is better left for another day.

The district court declined to certify the class of County Commissioner defendant because it found there "... was simply no evidence of any standardized practice among the 100 separate counties in the state to deprive anyone of any rights solely because of race." Again, this finding is not clearly erroneous.

The only way in which the counties were alleged to have acted to deprive plaintiffs of any rights because of race was because of the failure to hire black County Chairmen and because of pay increases of whatever nature granted by the counties. Yet, each county acted individually in its approval or disapproval of County Chairmen recommended for employment by the Extension Service. They acted according to no uniform ruling, and there is no allegation that they did. There is no allegation that the counties had anything to do with the circulation of

information about job openings, or that the circulation of job openings was discriminatory. Indeed, there were no black applicants for county chairmen for most of the vancancies for the job in the counties of the State. With respect to pay, there is only one tiny facet of the district court's fact finding which could have favored the plaintiffs and the government, that counties designated to which individual employees raises were given, and the fact finding has been demonstrated by appellants to be clearly erroneous. Otherwise, pay increases granted by county government were across-the-board, or for merit, or a percentage, and there is neither allegation nor proof that there was any discrimination by the counties in so awarding them.[5] The plaintiffs press their claim for the

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[5] For merit pay increases, see part D, infra.

certification of that class of defendants under FRCP 23(b)(1)(B) that adjudications with respect to one county would as practical matter be dispositive of the interests of other counties. Of course in this case thatcannot be true. If Brunswick County in the southeastern part of the State, for example, had deprived a black applicant employment because of his race or deprived him of pay raises because of his race, that could have nothing to do with whether Ashe County in the northwestern part of the state had done the same thing. In this connection, two cases are persuasive, although decided under FRCP 23(b)(2). In Paxman v. Campbell, 612 F.2d 848 (en banc) (4th Cir. 1980), we held that a class of defendants of 130 Virginia school boards was inappropriate when each was free to adopt maternity leave policies of entirely unknown differences or similarities, it being

uncontradicted there was no statewide policy in force, centrally directed or otherwise. The Sixth circuit followed Paxman in Thompson v. Board of Education, etc., 709 F.2d 200 (6th Cir. 1983), upon the same fact situation obtaining in Paxman. While those two cases were decided under a different part of the class action rule, the principle remains the same, that to have a proper class of defendants in a case such as this there must be either a statewide rule or practice so that relief is available if the rule or practice is invalid, or the adjudication with respect to a member of a defendant class must as a practical matter be dispositive of the interests of the other members of the class as provided in FRCP 23(b)(1)(B). Neither of those conditions is present here.

The decision of the district court declining to certify the class of county

commissioner defendants is thus without error.

B. Individual Salary Claims on Appeal

In addition to the denial of class certification, certain individual appellants appealed their claims of salary discrimination.

These salary claims were rejected by the district court. Simple salary comparisons were introduced to show some white agents who had no longer tenure or no more education earning more than the plaintiffs. Plaintiffs made no showing regarding their job qualifications and job performance which would raise their salary expectations to the level of an inference of discrimination.

In case of individual disparate treatment, the showing of a simple disparity is not sufficient to make a prima facie case of discrimination. The

rule of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 80 (1973), is that plaintiffs must show that they are qualified for an employment benefit which was denied they because of their race. Though evidence of salary disparities is relevant to the question at hand, the plaintiffs must show that they were qualified to be receiving a higher salary in order to shift the burden of production to the employer. Texas Department of Community Affiars v. Burdine, 450 U.S. 248, 252-253 (1981); Larson, 2 Employment Discrimination, §§50.22, 50.31(c) (1983). Lacking any data as to the relative qualifications of these plaintiffs compared to those who allegedly received higher salaries or as to the qualifications demanded by the jobs involved, the district court properly found no prima facie cases of disparate treatment had been made on behalf of these individual plaintiffs.

The individual appellants also raise on appeal the fact that they should be included in a class discriminated against which is the subject of the pattern and practice claims and discussed later in the opinion.

C. Wage Disparity Due to Pre-Act Discrimination

The plaintiffs claim that the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not. We do not think this is the law. "A public employer who from that date forward [date of the Act] made all its employment decisions in a wholly non-discriminatory way did not violate Title VII even if it had maintained an all-white work force by purposefully excluding Negroes." Hazelwood School District v. United States, 433 U.S. 99, 309 (1977). Along the same line, in

United Airlines v. Evans, 431 U.S. 533 (1977), a present seniority and thus salary disparity which existed on account of a previous unlawful termination on account of sex which had resulted in loss of seniority was held not to be actionable when no complaint had been filed by the plaintiff on account of her unlawful termination, although the court acknowledged that "the seniority system gives present effect to a past act of discrimination," 431 U.S. at 558 (1977). To the same effect are Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979) (present effect of uncomplained of racially discriminatory placement on seniority list held not actionable); Trabucco v. Delta Airlines, 590 F.2d 315 (6th Cir. 1979) (present lower pay and fringe benefits resulting from past uncomplained of unlawful reclassification on account of sex held not actionable);

Cates v. Trans World Airlines, Inc., 561 F.2d 1054 (2d Cir. 1977) (present adverse seniority effects resulting from an uncomplained of racially discriminatory refusal to hire are not actionable). See also Schlei and Grossman, Employment Discrimination Law (2d Ed.), p. 1053.

D. Salaries

Much of the dispute in this case centers around salaries of the county agents, whether full agent, associate agent, or assistant agent. The claim is that the salaries of black agents were lower because of their race.

The district court correctly declined to compare or include the salaries of County Chairmen with those of the agents. There is about a $4000 average salary difference between chairman and agent to begin with. The chairman is the head of the county based employees of the Exten-

sion Service. He is not routinely promoted from agent; the method of his selection is entirely different, and counting the salaries of the County Chairmen together with those of the agents for purposes of analysis could only distort the result.

At the outset of this part of the discussion, certain matters admitted or found by the district court and not appealed are important to remember. There is no discrimination in hiring. There has been no discrimination in entrance salaries since 1965. Neither is there discrimination in promotion from assistant to associate to full agent. Pay raises are of three kinds from whatever source, percentage raises, across-the-board raises, and merit raises. There is no discrimination in across-the-board and percentage raises. Everyone gets them.[6]

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[6] In arguing that the district court erred

This leaves only two sources of any discriminatory salary differential, the lingering effects of pre-Act discriminatory pay and the administration of the quartile system of ranking of performance of agents. Under the quartile system, each agent is placed in the first, second, third or fourth quartile, according to his

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in finding no discrimination on the merits of the private plaintiffs' salaries claim, the dissent fails to take account of certain matterns undisputed or not appeased by the plaintiffs. The dissent fails to mention that there has been no discrimination in hiring or in promotions, and no discrimination in entrance salaries since 1965. Because no dispute exists with respect to hiring, promotion, and post-1965 entrance salaries, the only discrimination that could exist would be in the quartile ranking system. As we demonstrate, however, the record does not support a finding of discriminatory effect in the assignment of quartile rankings. The dissent, nonetheless, on this subject as elsewhere addresses itself to certain weaknesses in the district court's opinion rather than the correctness of that court's judgment. Since we review judgments, not reasons, Eltra Corp. v. Ringer, 579 F.2d 294, 298 (4th Cir. 1978), even erroneous reasoning does not require reversal so long as the judgment is correct.

performance for the previous period. Approximately equal numbers of agents are supposed to be placed in each quartile. So, while the placing of an agent in a quartile follows a review of his performance under the Performance Review Guide, because of the necessary division of the agents into four quartiles, the performance of one agent relative to another is bound to be considered. The assignment to a quartile is made by the District Extension Chairman periodically, and merit pay increases, as distinguished from across-the-board and percentage increases, are ordinarily granted to those agents in the top three quartiles, and from time to time an agent's higher quartile rank will result in a higher merit pay increase. Various counties contribute varying amounts of the agents' pay, and indeed, agents are paid by two checks, one from the county, the other from the Extension

Service. Some counties pay higher salaries than do others.

The plaintiffs, as did the defendants, introduced the testimony of a statistical expert. Each of the statisticians had performed a multiple regresion analysis with respect to the salaries of the county agents. The plaintiffs' expert testified with respect to the years 1974, 1975 and 1981, while the defendants' expert testified with respect to 1975 and 1981. A regression analysis is a method for examining the relationships among large numbers of variables. Such an analysis indicates the degree to which changes in the value of one variable corresponds to the value of the other. Barnes, Statistics as Proof, (1983), p. 293 et seq.

The plaintiffs' expert considered the variables of tenure, education, and race, and was of opinion there were statistically significant components of salaries

attributable to race for the years 1974, 1975 and 1981, but he had not included job level or title (assistant, associate, or full agent) in his analysis. When job level was added, he did not find a statistically significant component in 1981. In the most general terms, the defendants' expert agreed for the years 1975 and 1981. He offered isolated data anaylsis, however, which tended to show no discrimination. He had included job title in his analysis. The district court refused to accept the plaintiffs' expert testimony as proof of discrimination by a preponderance of the evidence because the plaintiffs' expert had not included a number of variable factors the court considered relevant, among them being the across-the-board and percentage pay increases which varied from county to county. The district court was, of course, correct in this analysis. It

defies logic to compare the salary of an agent in a county which has granted many or large increases or pays high salaries with one in a county which has granted few or small increases or pays lower salaries. The across-the-board and percentage pay increases granted by various counties in varying amounts, as well as simply paying higher salaries, are bound to have an effect on the salaries of the agents in the various counties. In addition, as such increases accumulate through the years, greater disparity from county to county may certainly be expected rather than less. Percentage increases for all employees also would increase the dollar amount of existing disparities, and dollar amounts are what the statisticians dealt with.

Most of plaintiffs' salary case is built upon the multiple regression analysis of their expert, and we think the

district court was not required to accept that testimony as proof by a preponderance of the evidence. In the first place, the analysis contained salary figures which reflect the effect of pre-Act discrimination,[7] a consideration not actionable under Title VII but permissible to show the general background of the case, or intent, or to support an inference that such discrimination continued. Compare Hazelwood, p. 309 thereof and n.15, with Lehman v. Trout, No. 83-706, 52 L.W. 3628 (1984). Since the data used by the statisticians included pre-Act hires, there is bound to have been a racial component in each of their regression analyses, for the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity

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[7] An inspection of the data bases for the regression analyses shows numerous pre-Act hires, both pre-1965 and pre-1972.

resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all of such disparity. The across-the-board and percentage pay increases granted by a county, as well as counties which simply pay higher salaries, also are bound to flaw the regression analyses since they were not taken account of. It is also apparent that percentage pay raises from whatever source will magnify any existing disparity. Leaving aside for the moment the question of merit pay increases, we do not believe the district court was required to accept the conclusions of the plaintiffs' expert for the reasons we have above set forth.

The conclusion of the district court that the multiple regression evidence was flawed is supported by authority. The purpose of multiple regression is to account for changes in a single variable

through the examination of other variables which might be expected to influence that variable. In the present instance, that single variable is salary. An appropriate regression analysis of salary should therefore include all measurable variables throught to have an effect on salary level. Barnes, Statistics as Proof (1983), p. 339; Fisher, Mutliple Regression in Legal Proceedings, 80 Colum. L. Rev., 702, 74 (1980). However, both experts omitted from their respective analysis variables which ought to be reasonably viewed as determinants of salary. As a result, the regression analyses presented here must be considered unacceptable as evidence of discrimination.

The merit pay increases are another matter. They are granted to agents in the first three quartiles but not in the fourth, so that if there were discrimina-

tion and black employees were assigned to a lower quartile, expecially the fourth quartile, because of their race, there would be a salary disparity resulting on acount of race.

On appeal, appellants rely upon quartile rankings by district and race for only one year, 1981, and we are told in the plaintiffs' brief, p.40, n.40, that for the year 1975 the quartile scores of black employees were relatively better than those of white employees. The 1981 rankings appear in the table just below:

QUARTILE RANKINGS
BY DISTRICT AND RACE

DISTRICT	QUARTILE							
	I		II		III		IV	
	W	B	W	B	W	B	W	B
NC	17	5	16	7	14	12	12	9
NE	12	2	13	3	10	5	8	3
NW	19	1	21	1	17	3	9	4
SE	22	1	18	9	14	6	10	7
SW	20	3	21	2	18	2	12	4
W	16	-	16	-	15	-	13	-
TOTAL	106	12	105	22	88	28	64	27

Lumping together the first three quartiles, for employees in those quartiles are the ones who get the merit pay increases, a standard deviation analysis, with the expected number of black employees in the first three quartiles as 75%, indicates no statistically significant variation in the assignment of quartile rankings. Under the rule formulated in

Hazelwood, "more than two or three standard deviations" would be required to undercut the presumption that employment decisions were being made without respect to race. Hazelwood, p.311, n.17. The following table shows the results here to be well below this threshold.[8]

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[8] The formula used to determine the amount of variation between the actual and expected occurrence percentages in terms of standard deviations is as follows:

$$\frac{n(p-a)}{\sqrt{np(1-p)}}$$

where a is the proportion of blacks actually in the first three quartiles, p is the proportion of all agents that would be expected to be in the first three quartiles, and n is the total sample size. See Moultrie v. Martin, 690 F.2d 1078, 1083, n.8 (4th Cir. 1982).

Total by District
(Expected occurrence in first three quartiles - 75%)

District	Actual Occurrence of Blacks in First 3 Quartiles	
NC	24/33=.7273	Std.Dev.= 0.3012
NE	10/13=.7692	Std.Dev.=(-)0.1599
NW	5/ 9=.5556	Std.Dev.= 1.3469
SE	16/23=.6957	Std.Dev.= 0.6014
SW	7/11=.6364	Std.Dev.= 0.8701
W	No Blacks in 1981	

Even if the expected occurrence in each district is instead the actual percentage of all employees in the district, black and white, which occurred in the first three quartiles in 1981, only one district could have any statistically significanct variation under the Hazelwood analysis, as is shown in the table below. And in that one district (NW) a student's t adjustment shows the variation not to be

of statistical significance under the Hazelwood rule.[9]

Total by District
(Actual occurrences in each district used as norm)

NC Expected Occurrence = 71/92 = .7717

Actual Ratio Blacks = 24/33 = .7273

Std. Dev. from Expected Ratio = .6077

NE Expected Occurrence = 45/56 = .8036

Actual Ratio Blacks = 10/13 = .7692

Std. Dev. from Expected Ratio = .3122

NW Expected Occurrence = 62/75 = .8267

Actual Ratio Blacks = 5/ 9 = .5556

Std. Dev. from Expected Ratio =2.1487

Student's t std. dev. for

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[9] The student's t adjustment is done to accomodate the small sample size found in this district (nine blacks). The student's t distribution teaches that when the sample size is less than approximately thirty, the number of standard deviations must be increased in order to achieve the same significant level. See R. Winkler & W. Hays, Statistics: Probability, Inference, and Decision, 366 (2d ed. 1970).

sample size of 9 at 95%
confidence level = 2.306

SE Expected Occurrence = 70/87 = .8046
Actual Ratio Blacks = 16/23 = .6957
Std. Dev. from Expected Ratio =1.3172

SW Expected Occurrence = 66/82 = .8049
Actual Ratio Blacks = 7/11 = .6364
Std. Dev. from Expected Ratio =1.4103

W No Blacks in 1981.

We are unable to say that these statistics support a finding of discrimintionin the assignment of quartile ranking.[10]

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[10] Indeed, the comparisons made in this statistical analysis constitute a more advantageous analysis for the plaintiffs than might have otherwise been conducted. The present analysis defines the expected occurrence of blacks in the first three quartiles as wither 75% of the actual occurrence ratio of an entire group of a district's agents. A more mathematically correct and appropriate analysis would

define the expected occurrence ratio of blacks in the first three quartiles as the proportion of blacks in a district's population of agents. This ratio would then be compared to the actual proportion of blacks in the first three quartiles. The resulting standard deviations would then provide a more accurate reflection of any difference between the representation of blacks in a district's population of agents and the representation of blacks in the first three quartiles.

This type of comparison should be considered more precise in mathematical terms. Barnes, Statistics as Proof (1983), p., 228. More importantly, it permits the standard deviation analysis to focus on the essential issue of whether blacks are being represented in the first three quartiles in proportions similar to their representation in the population of agents. It is this comparison between the representation of a minority in a suspect group and its representation in a relevant larger population which was the principal focus in Hazelwood, and has been the preferred comparison in employment discrimination and like litigation. Casteneda v. Partida, 430 U.S. 482, 494-497, 97 S.Ct. 1271. 51 L.Ed.2d 4598 (1977) (racial discrimination in grand jury selection); Teamsters v. United States, 431 U.S. 324, 337-338, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (racial discrimination in hiring).

There are only two ways in which the salaries of the county agents may reflect a racially discriminatory effect. The first is because of the lingering effect of pre-Act discrimination, and the second is because of the assignment of quartile rankings, the only aspect of salary computation in which the Extension Service

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In this instance, a comparison of the Hazelwood standard with the standard deviation analysis in the body of the opinion establishes that our use there of 75% or actual occurrence ratios as the expected ratio was done to present the plaintiffs' position in a the best possible light. It is not a precedent to be followed; the Hazelwood standard rather is the rule. The application of a standard deviation analysis to the representation of black agents in the first three quartiles as compared to their representation in a district's agents population fails to produce any standard deviations greater than one. Under the Hazelwood comparison, these results make the evidence even less convincing that quartile assignments were a function of racial discrimination. The table below summarizes the data:

exercised any discretion. The first is not separately actionable, as we have previously set forth, and the second we do not think is supported by the record. Thus, the judgment of the district court with respect to salaries was without error.

E. County Chairmen

The last subject we will dwell upon in any detail is that of selection of County Charimen. The plaintiffs claim that this selection process has been

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District	Expected	Actual	Std.Dev.
NC	.358(33/92)	.338(24/71)	.36
NE	.232(13/56)	.222(10/45)	.16
NW	.12(9/85)	.081(5/62)	.95
SE	.264(23/87)	.229(16/70)	.68
SW	.134(11/82)	.106(7/66)	.67

flawed by racial discrimination, and the government as well as the named plaintiffs claim that the selection process has been flawed by a pattern or practice of discrimination.

Although there may be some repetition, some salient factors are worth repeating. The top administrative position in the Extension Service at the county level is that of County Chariman. Those holding that position have administrative and leadership responsibilities in addition to normally carrying a subject matter program work load depending on the needs of the county. The position is not within the promotional line from County Agent; it must be applied for separately, and the method of selection is neither akin to the hiring procedure for county agents nor to the process of their promotion. It is open to any qualified applicant. The minimum qualifications are

six years (formerly seven) of service with the Extension Service or the equivalent, at least two years of which must have been in service of the North Carolina Extension Service. A master's degree is desirable but is not required, but a bachelor's degree is required. While applicants are not required to be in the employ of the Extension Service, it is obvious that the requirements of two years' employment in that service in North Carolina will have the effect of causing the vast majority of the applications to be from employees of the Extension Service, which is what happened here.

When an impending vacancy becomes known, the District Chairman meets with the County Commissioners and reaches a decision as to the desired qualifications of the prospective applicants with respect to subject matter, knowledge, and competency. This is communicated to adminis-

trative officials in the Extension Service, and an announcement is made of the vacancy, not only to all the county agents but also to the various educational institutions from which the Extension Service recruits personnel. Each applicant meeting the minimum qualifications is interviewed by the district chairman, the assistant director for county operations, the associate director, and the director of the Extension Service. These people then meet and come to a decision as to whom they will recommend to the County Commissioners of the county to fill the vacancy. Sometimes only one applicant is recommended; sometimes more than one is recommended. The County Commissioners then must approve one of the recommended names, for the agreement of the Extension Service and the County Commissioners is required in order to fill the vacancy.

At the outset, we should say that the individual plaintiffs who testified in support of their claims that they had been discriminatorily denied selection to County Chairmen had their claims considered by the district court on evidence particularly applicable to each case. The district court found against each of them. These particular findings of fact and conclusions of law have not even been appealed except in the context of a refusal to find a pattern or practice discrimination. So, there are no cases of actual discrimination to bolster a statistical case. The district court properly placed the burden of proof on the plaintiffs to prove their individual claims. Of course if the pattern and practice claims had been successful, then these plaintiffs, being in the class discriminated against, would have had the benefit of a presumption that they had

been victims of the class discrimination, and the burden of proof would have been shifted to the defendants to prove that such claimants should not recover. Teamsters v. United States, 431 U.S. 324, 359 (1977), construing Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

We will next proceed to an analysis of the statistical information which is relied upon to prove the pattern or practice claims. We must keep in mind that it is the Extension Service whose actions are complained of here, as distinguished from the action of the counties, so it is the "employment decisions," Hazelwood, p.309, of the Extension Service which must be examined. In the context of this case, the employment decisions made by the Extension Service with respect to the selection of County Chairmen were made when the Service either recommended or did not recommend an

applicant for an existing vacancy to the County Commissioners. Thus, it is the act of recommending or not recommending which we examine. The district court found that Title VII was made applicable to the Extension Service in 1972 and that claims under 42 U.S.C. §§1981 and 1983 arising prior to November 18, 1968 woul be barred by the statute of limitations. In this narrow aspect of the case, the bar of limitations prior to November 18, 1968, the plaintiffs, defendants, and the district court are in agreement. The district court found there had been no intentional discrimination proved which was necessary to maintain the case under §§1981 and 1983, and analyzed the statistical evidence from 1972 on.

The appllants claim that, for 1962 through 1981, of 227 appointments to County Chairmen only 6 were black, and that, although blacks account for one-

fourth of the full agents and one-fifth of the professional work force, they have received only 2.6% of the promotions to County Chairmen during that time. Although the claim is not specifically articulated, of course not more than 6% of the existing County Chairmen were black. Thus, they say these statistics only support a finding of discriminatory selection and thus a finding of a pattern or practice of discrimination.

The statistics as thus presented, however, do not tell the full story. There was no position of County Chairman prior to 1962-63, when it was created. A County Chairman was appointed in 1962-63 for each of the white county units, the Service then being segregated as previously related. Black county units did not have county chairmen but worked through the District Extension Chairmen. In 1964 one more, and in 1965, 6 more whites were

appointed County Chairmen. In 1965, the black and white units of the Extension Service were merged and the then existing white chairmen became the County Chairmen of the county units of the integrated Extension Service. There were no appointments in 1966, and in 1967, 5 more white chairmen were appointed. Between 1968 and 1970, 31 more whites were appointed, and, in 1971, 3 more whites and one black were appointed. In March 1972, the Extension Service was placed under Title VII, and since that time the balance of the appointments to County Chairmen have been made. For the purpose of analysis, we assume that the naked figures presente above might support an inference of discrimination in the selection of County Chairmen, but, as Hazelwood, p.309, directs, an employer must be given an opportunity to prove that each of his post-Act employment decisions was made in

a non-discriminatory way. In this respect, the gross statistics we have related above show that at least 104 of the appointments in question (1962-64) were made years prior to the time Title VII was effective and well prior to the time of the Civil Rights Act of 1965 which became effective in 1965. The six 1965 and five 1967 appointments were not actionable since the statute of limitations ran on all appointments before 1968, as the parties agree. Indeed, our examination of the record reveals little or no attempt to present precise data on the appointments prior to 1968. The data for the years from 1968 until the date of trial appears to be fairly complete. The holding of the district court that there was no intentional discrimination shown for the appointments prior to 1972 is not the subject of serious objection on appeal, but we have analyzed the data from

1968 forward so as not to rely upon that finding alone. In this pattern or practice case, we have not excluded post-Act 1965 data and 1967 data from our analyses because barred by limitations; it is just that we do not find it in the record.

The district court found that there had been 77 vacancies since the institution of statewide announcements of vacancies in 1972, and, of that number, blacks had not applied for 59 but had applied for 18 of the vacancies. It found that 18 individual blacks did apply for the 18 vacancies, that 5 of them were selected as County Chairmen by both the Extension Service and the county involved and that their rate of selection was 23% of the applicants. For the same 18 vacancies, the court found that there were 37 white applicants, of which 13 were selected as County Chairmen, or a selec-

tion rate of 35%. It held that since the black rate of selection was 80% of the white that it complied with the EEOC guideline in 29 C.F.R. §1604D which provides that a selection rate of a minority group of more than 4/5ths of the majority rate will generally not be regarded by federal enforcement agencies as evidence of adverse impact.

Appellants complain of the method of analysis of the district court. They say that the district court considered black applicants, not applications, so that those applicants who applied for more than one vacancy are only counted as one instead of two or more, thus increasing the percentage rate of black appointments. They also say that considering the vacancies for which blacks only applied but excluding the vacancies for which whites only applied further flaws the analysis by treating as irrelevant the

vacancies for which whites only applied, but finding evidence of non-discrimination by counting the vacancies for which blacks only applied. They say that the data should be analyzed only for positions for which both blacks and whites applied.

While there may be some jusitification for the method of analysis by the district court, if we should consider that discrimination is against people and not against applications, we think that, without deciding that either method is correct, a comparative analysis is worthwhile. We believe that a correct analysis of the data at this point in one respect, however, should not be either as the district court analyzed it or as appellants would have use do. The Extension Service is not separately responsible for the appointment to fill the vacancy, but it is separately responsible for the recommendation of one or

more of the applicants. Thus, it is the action of the Extension Service upon each application that is its employment decision, and those are the employment decision that we examine. The results of our examination are set out in the table below:

RECOMMENDATION RECORD OF THE NCAES FOR POSITIONS FOR WHICH BLACKS APPLIED, 1972-1981

		Applications		Recommendations	
Year	County	B	W	B	W
1972	No black applications				
1973	Lenoir	2	7	1	3
1973	Iredell	1	3	0	1
1974	Northampton	1	2	1	2
1975	Columbus	1	4	0	1
1975	Martin	1	3	0	1
1975	Wayne	1	4	0	1
1975	Iredell	2	2	0	1
1976	Johnston	2	6	1	2
1976	Union	1	1	0	1

1976	Cumberland	1	0	1	0
1977	Granville	1	2	1	1
1978	Pitt	1	0	1	0
1979	Warren	2	1	1	0
1980	Nash	1	2	0	1
1980	Anson	1	0	1	0
1980	Hertford	1	2	0	1
1981	Vance	1	2	0	1
1981	Hoke	1	1	1	0
TOTAL		23	44	9	18

Results of all vacancies for which blacks applied:

Black Recommendation Rate 9/23=39.1%

White Recommendation Rate 18/44=40.9%

Black Rate as Percentage of White Rate =95.9%

Removing Positions for which only blacks applied:

Black Recommendation Rate 6/20=30%

White Recommendation Rate 18/44=40.9%

Black Rate as Percentage
of White Rate =73.3%

It is apparent from the table, if we consider all of the vacancies for which blacks applied, the Extension Service recommended essentially the same percentage of black applicants as it did white applicants, for a difference of one recommendation would have made the black rate 112.5% of the white rather than 95.6% as shown. But, in accordance with appellants' contentions, if we remove the three vacancies for which blacks only applied and exclude also the vacancies for which whites only applied, the black recommendation rate of 30% of the applicants as opposed to the white recommendation rate of 40.8% shows a black rate of 73.3% of the white. While not within the EEOC guidelines, a difference of one recommendation would have made the black

rate 90.7% of the white because of the small numbers involved, again a figure well within the guideline.

As the table above indicates, we have used 19 vacancies which we find rather than 18 as used by the district court and the appellants. Using the district court's method of caculation for those vacancies, but using applications instead of applicants as appellants suggest, we find that blacks receive 6 of the 19 appointments for which they applied. Six of the 23 black applications were ultimately successful, or 26.3%, while 13 of the 44 white applications were, or 29.6%. Eighty percent of the white rate would be 23.7%, and the black rate of appointment (26.3%) as compared to the white was 89%, well within the EEOC guidelines.

With respect to the parties and the district court, however, we think that the correct method of analysis of this

important data has not been advanced. We do not think that the applicant flow data should be analyzed as appellants wish us to do, using only vacancies for which both blacks and whites applied. Appellants' suggested method, instead of determining whether there was sufficient disparity in the approval rates of members of the class for a sufficient period of time from which discrimination might be inferred against the class, would narrow it down in each instance in the usual case to require an analysis of all the pending applications on the day the particular appointment was made. This would permit either a wide disparity in employment decisions or a wholly evenhanded employment policy to go either unnoticed or unconsidered by the observation of a small number of employment decisions. It also could, and most probably would, require a McDonnell-

Douglas[11] analysis of each vacancy to ascertain as a preliminary matter whether the data with respect to that vacancy should be included in an applicant flow analyses.

We are of opinion and hold that, on the data presented here, an analysis of all of the vacancies and the action on all of the applications for all of the vacancies is the proper way to consider the applicant flow data. See Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974). This data is set out in the next table which appears below. We have used Government Exhibit 69 as the starting place for this table of vacancies and the action of the Extension Service with respect to them. Where no information is shown on that exhibit for other applications, we have assumed the successful

[11] McDonnell-Douglas v. Greene, 441 U.S. 793 (1973).

applicant was the only one unless others as noted were found in those parts of the record we were examining. Where we could find no other recommendations for the vacancy, we have assumed the successful applicant was the only one. All of the vacancies in our table except three appear on Government Exhibit 69.

The above data may be summarized as follows, leaving out of our computations the 3 employees whose race is not shown. Background data for the 11 vacancies occurring in 1965 and 1967 is sparse in the record, and we have not included them for that reasons. Although the uniform notice of vacancies was not commenced until November 1972, Title VII became applicable to the Extension Service in March of that year, so we have included 1972 with subsequent years for the purepose of grouping data in the table and analysis.

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Hoke[12]	1981	W. Featherstone	B	W. Featherstone
		E. Willis	W	
Chowan[13]	1981	M. William	W	M. William
		Z. Harrell	W	
		H. Riddick	W	H. Riddick
Rutherford[14]	1981	S. West	W	
		D. Hennessee	W	
		E. Ware	W	E. Ware
Pamlico[15]	1981	F. May	W	F. May
		R.R. Harris	W	

[12] GX69 (A1736); Tr. 95 (Sasser); GX172.1 at 54-9, 95 (Sasser Dep.).

[13] GX69 (A1736); A. 792, 915-6; Tr. 3666, 4005-7 (Blalock).

[14] GX69 (A1736); Tr. 4922 (Black).

[15] GX69 (A1736).

Chart 1

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Rockingham[16]	1981	F. Green	W	F. Green
Avery[17]	1980	J.M. Pittman	W	J.M. Pittman
		J. Hensley	W	
Clay[18]	1980	J. Reeves	W	J. Reeves
Cabarrus[19]	1980	A.W. Stanford	W	A.M. Stanford
		W. Triplett	W	
McDowell[20]	1980	J.R. Mbe	W	J.R. Mabe

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16 GX69 (A1736); Tr. 4927 (Black).

17 GX69 (A1736).

18 GX69 (A1736).

19 GX69 (A1736).

20 GX69 (A1736).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Vance[21]	1980	D. Cobb	W	D. Cobb
		P. Stainback	W	
		F. Belfield	B	
Ashe[22]	1980	J. Carey	W	J. Carey
		R.F. Breland	W	
		D. Tugman	W	
Hertford[23]	1980	J.W. Dunham	W.	J.W. Dunham
		J. Daughtry	W	
		J.E. Wright	B	

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[21] GX69 (A1736); Tr. 3847, 4375 (Blalock), 4687-88 (Black), 5562 (Dew).

[22] GX69 (A1736); Tr. 92 (Sasser).

[23] GX69 (A1736); Tr. 3833, 4375 (Blalock), 4715-22, 4877 (Black), 5706 (Patterson), 6488 (Hunter).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Perquimans[24]	1980	W.R. Jester	W	W.R. Jester (Juster,Jessup?) K. Bateman
Anson[25]	1980	H. Royals	B	H. Royals
Nash[26]	1980	J. Stephenson	W	J. Stephenson
		F. Belfield	B	
		B. Page	W	

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[24] GX69 (A1736); A. 795, Tr. 3669 (Blalock); Tr. 5548, 5598 (Dew); GX 169.1 at 49-50 (Patterson Dep.).

[25] GX69 (A1736); Tr. 6399-6402 (Yancey).

[26] GX69 (A1736); Tr. 3847 (Blalock), 4682-87 (Black). But see GX 166.1 at 115-16 (Liner Dep. - claims Belfield sole other applicant).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Buncombe[27]	1980	G. Biddix	W	G. Biddix
		J.B. Reeves	W	
		R. Ammons	W	
Montgomery[28]	19??	R.C. Reece	W	R.C. Reece
Surry[29]	19??	J. Waddell	W	J. Waddell
Stokes[30]	19??	S. Hilton	W	S. Hilton
Cleveland[31]	1979	B.F. Spencer	W	B.F. Spencer

[27] GX69 (A1736); Tr. 492-23 (Blalock).

[28] DX67-46 (Montgomery County Folder); Tr. 4923 (Blalock).

[29] DX67-97 (Surry County Folder); Tr. 4925 (Blalock).

[30] DX67-96 (Stokes County Folder); Tr. 4926 (Blalock).

[31] GX69 (A1736).

Chart 5

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Robeson[32]	1979	J. Richardson	W	J. Richardson
		M.K. Dennis	W	
Lee[33]	1979	J. Hall	W	J. Hall
		F.T. Donnell	W	
		C.J. Cameron	W	
Jones[34]	1979	M.C. Small	W.	M.C. Small
		C. Hammond	W	
		F. Barber	B	
Northhampton[35]	1979	B. Rogister	W	B. Rogister

[32] GX69 (A1736).

[33] GX69 (A1736).

[34] GX69 (A1736); Tr. 1935 (Barber), 3859-60, 4375 (Blalock), 4577-82, 4849 (Black).

[35] GX69 (A1737).

Chart 6

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Vance[36]	1979	J. Stephenson	W	J. Stephenson
		P. Stainback	W	
		M. Bowden	W	
New Hanover[37]	1979	C.E. Lewis	W	C.E. Lewis
		T. Dail	W	
		H. Morris	W	
		J.E. Warren	W	
Caswell[38]	1979	L.N. White	W	L.N. White
		D. Pointer	W	
Pamlico[39]	1979	R. Piland	W	R. Piland

[36] GX69 (A1737); Tr. 6393 (Liner).

[37] GX69 (A1737).

[38] GX69 (A1737).

[39] GX69 (A1737).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Warren[40]	1979	L.C. Cooper	B	L.C. Cooper
		G. Koonce	B	
		E. Ballinger	W	
Onslow[41]	1979	D. Baucom	W	D. Baucom
		C. Hammond	W	
		C. Padgett	W	
Bladen[42]	1979	M.K. Dennis	W	M.K. Dennis
		H. Morris	W	

[40] GX69 (A1737); A. 918 (Blalock); Tr. 1893-95 (Cooper), 3858, 4010, 4375 (Blalock), 4703-5 (Black).

[41] GX69 (A1737).

[42] GX69 (A1737).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Moore[43]	1979	C.E. Hammond	W	C.E. Hammond
		T. Colson	W	
		P. Seabolt	W	
		C. Cameron	W	
Davie[44]	1979	W.E. Mainous	W	W.E. Mainous
		Judge A. Pierce	W	
		R. Thompson	W	
Yancey[45]	1979	J. Ray	W	J. Ray
		C. Bickford	W	
		J.G. Hensley	W	

[43] GX69 (A1737).

[44] GX69 (A1737); GX172.1 at 92 (Sasser Dep.).

[45] GX69 (A1737).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Forsyth[46]	1979	J.D. Carroll	W	J.D. Carroll
		W.E. Mainous	W	X
		W. Gurkin	W	W. Gurkin
		A. Stanford (?)	W	
Randolph[47]	1979	T. Baker	W	T. Baker
		D. Peterson	W	
		D. Finette	W	
		R. Freeman	W	
		D. Young	W	
		R. Haines	W	R. Haines

[46] GX69 (A1737); A. 796, Tr. 3670 (Blalock); Tr. 4827-8 (Black), 5598 (Dew); GX172.1 at 54-59, 94 (Sasser Dep.).

[47] GX69 (A1737); A. 793-4, Tr. 3667-8 (Blalock); Tr. 4944 (Black, 5965 (Meldau).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Wayne[48]	1978	W. Townsend	W	W. Townsend
		J.H. Wynne	W	
		W. Lamm	W	
Rowan[49]	1978	J.H. Caudill	W	J.H. Caudill
		R. Hines	W	
Duplin[50]	1978	L. Britt	W	L Britt
		R. Swain	W	
		S.B. Wilson	W	
Pitt[51]	1978	L. James	B	L. James

[48] GX69 (A1737); Tr. 4929 (Black).

[49] GX69 (A1737).

[50] GX69 (A1737); A. 745, Tr. 3617-18 (Blalock).

[51] GX69 (A1737); A. 1004, Tr. 3821, 4375 (Blalock); Tr. 2530 (James).

Chart 11

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Polk[52]	1977	O.R. Ammons	W	O.R. Ammons
		C P. Bickford	W	
		J.M. Groff	W	
Bertie[53]	1977	W.J. Griffin	W	W.J. Griffin
Mitchell[54]	1977	D. Terrell	W	D. Terrell
Alleghany[55]	1977	H. Dosier	W	H. Dosier
		W. Fowler	W	
		W.M. Hearn	W	
		J. Weaver	W	J. Weaver

[52] GX69 (A1737).

[53] GX69 (A1737).

[54] GX69 (A1738).

[55] GX69 (A1738); A. 794, Tr. 3668 (Blalock); Tr. 4928 (Black), 5962 (Meldau); GX167.1 at 13-15 (Meldau Dep.).

Chart 12

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Granville[56]	1977	F. Baker	W	F. Baker
		I.W. Murfree	B	I.W. Murfree
		D. Wilkinson	W	
Watauga[57]	1977	G. Brewer	W	G. Brewer
		B. Fowler	W	B. Fowler
Wilson[58]	1977	C.H. Jernigan	W	C.H. Jernigan
		F. Baker	W	

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[56] GX69 (A1738); Tr. 1613, 1617 (Murfree); A. 792-4, 1004, Tr. 3666-68, 4375 (Blalock); A. 1069, Tr. 4659 (Black); A. 1356-58, Tr. 5829-31, 5876 (Dobbins).

[57] GX69 (A1738); A. 793, Tr. 3667 (Blalock); Tr. 5964 (Meldau); GX 167.1 at 13-15 (Meldau Dep.).

[58] GX69 (A1738). But see Tr. 5863 (Dobbins claims Jernigan sole applicant).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Greene[59]	1977	R.A. Hayes	W	R.A. Hayes
Cumberland[60]	1976	B.T. McNeil	B	B.T. McNeil
Lincoln[61]	1976	D. Choate	W	D. Choate
		A.L. Smith	W	
		H. Waynick	W	
Wake[62]	1976	V.B. Lynn	W	V.B. Lynn
Union[63]	1976	M.C. Howell	W	M.C. Howell
		P.E. Bazemore	B	

[59] GX69 (A1738).

[60] GX69 (A1738); A. 1005, Tr. 4376 (Blalock); Tr. 1397-98, 1420 (McNeil).

[61] GX69 (A1738).

[62] GX69 (A1738).

[63] GX69 (A1738); Tr. 4669-76, 4841 (Black), 5605 (Dew).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Brunswick[64]	1976	R.M. Coleman	W	R.M. Coleman
		D.E. Baucom	W	
		M.K. Dennis	W	
Swain[65]	1976	C.D. Bunn	W	C.D. Bunn
		R. Hyatt	W	
Transylvania[66]	1976	R.R. Hyatt	W	R.R. Hyatt
		R. Hyatt	W	
		J.H. Ray	W	
		D. Winters	W	
		L. Best	W	

[64] GX69 (A1738).

[65] GX69 (A1738).

[66] GX69 (A1738).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Cabarrus[67]	1976	E.E. Bishop	W	E.E. Bishop
		J.P. Bowles	W	
Johnston[68]	1976	B. Woodard	W	B. Woodard
		D. Stanaland	W	
		F. Baker	W	
		H. Lloyd	W	
		P. Westerbeck	W	
		H.F. Palmer	B	
		J. Stephenson	W	
		L. James	B	L. James
Alamance[69]	1975	M.B. Wright	W	M.B. Wright
		R.J. Freeman	W	

[67] GX69 (A1738).

[68] GX69 (A1738); A. 1005, Tr. 3819-24, 4376 (Blalock); Tr. 94 (Palmer), 2529 (James), 4691-94 (Black), 5880 (Dobbins), 6421 (Lynn).

[69] GX69 (A1738).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Buncombe[70]	1975	D.R. Burnette	W	D.R. Burnette
		C.P. Bickford	W	
		J.D. Brooks	W	
		N. Stancil	W	
		R. Hyatt	W	
Stanly[71]	1975	J.F. Simpson	W	J.F. Simpson
		C. Baker	W	C. Baker
		R. Kiser	W	
		F.J. Rivers	W	
Pender[72]	1975	W.F. Walker	W	W.F. Walker
		D.E. Baucom	W	
		J.G. Richardson	W	
		J. Wynne	W	

[70] GX69 (A1738); A. 797, Tr. 3671 (Blalock); Tr. 5547 (Boone).

[71] GX69 (A1738); A. 797, Tr. 3671 (Blalock); Tr. 5547-8 (Boone), 5597, 5602, 5691 (Dew).

[72] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Iredell[73]	1975	K. Vaughn	W	K. Vaughn
		D.O. Ivey	B	
		S.D. Little	B	
		J. Smith, Jr.	W	
Beaufort[74]	1975	M.C. Griffin	W	M.C. Griffin
		H.C. Riddick	W	
		J. Cullipher	W	
		R.M. Pilch	W	
		W.M. Hearn	W	
		G. Sawyer	W	
		S. Warrick	W	
		G. Ambrose	W	
		H. Morris	W	

[73] GX69 (A1739); A. 1005, Tr. 4376 (Blalock).

[74] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Person[75]	1975	F.J. Rivers	W	F.J. Rivers
		M.B. Wright	W	
Tyrrell[76]	1975	F.S. Voliva	W	F.S. Voliva
Wayne[77]	1975	T.S. Godwin	W	T.S. Godwin
		F. Baker	W	
		W. Lamm	W	
		W. Townsend	W	
		B.T. McNeil	B	

[75] GX69 (A1739).

[76] GX69 (A1739); Tr. 4924 (Black.

[77] GX69 (A1739); A. 1005, Tr. 4376 (Blalock).

Chart 19

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Martin[78]	1975	L.L. Allen	W	L.L. Allen
		R.M.K. Edwards	B	
		C.J. Cameron	W	
		P.C. Bryant	W	
Columbus[79]	1975	G.D. McCullen	W	G.D. McCullen
		M.K. Dennis	W	
		H. Lloyd	W	
		H. Morris	W	
		J. Spaulding	B	
Pasquotank[80]	1974	D. Baker	Q	D. Baker
		W.M. Hearn, Sr.	W	

(Continued)

[78] GX69 (A1739); A. 1005, Tr. 3861-2, 4376 (Blalock); Tr. 2779, 2792-97 (Edwards).

[79] GX69 (A1739); A. 1005, Tr. 4376 (Blalock).

[80] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		J.R. Vaughn	W	
		H. Morris	W	
		V. Lynn	W	
81				
Burke	1974	H.L. Miller	W	H.L. Miller
		R.M. Rowden	W	
		Roger Hyatt	W	
		Robert Hyatt	W	
		L. Smith	W	L. Smith
82				
Alexander	1974	B.G. Westbrook	W	B.G. Westbrook
		Roger Hyatt	W	
		K. Patterson	W	
83				
Caswell	1974	M.C. Small	W	M.C. Small

[81] GX69 (A1739); Tr. 5548, 5597 (Dew).

[82] GX69 (A1739).

[83] GX69 (A1739).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Northampton[84]	1974	E.J. Long	W	E.J. Long
		F. Belfield	B	F. Belfield
		D. Eason	W	D. Eason
Wilkes[85]	1974	H.M. Ramseur	W	H.M. Ramseur
		M.B. Wright	W	
Watauga[86]	1974	W.C. Richardson	W	W.C. Richardson
		G.R. Brewer	W	
		R. Haines	W	
		A.A. Greene	W	
		H.B. Hagwood	W	

(Continued)

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[84] GX69 (A1739); A. 1005, Tr. 4376 (Blalock); Tr. 1010, 1014-15 (Belfield), 5639 (Dew), 5866 (Dobbins).

[85] GX69 (A1739).

[86] GX69 (A1740).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		H. Lloyd	W	
		C.D. Bunn	W	
		J.W. Gentry	W	
		P. Guyer	W	
Iredell[87]	1973	A. Stanford	W	A. Stanford
		D.O. Ivey	B	
		H.M. Stoney	W	
		H.W. Myers	W	
Haywood[88]	1973	H. McCall	W	H. McCall
		H.L. Miller	W	

[87] GX69 (A1740); A. 1005, Tr. 4376 (Blalock).

[88] GX69 (A1740).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Lenoir[89]	1973	W.S. Lamm	W	W.S. Lamm
		J.H. Wynne	W	
		W.N. Payton	B	
		G.E. McDaniel	B	G.E. McDaniel
		R.L. Stroud	W	
		W.C. Johnson	W	W.C. Johnson
		T.S. Godwin	W	
		C.H. Jernigan	W	C.H. Jernigan
		F.H. Baker	W	
Montgomery[90]	1973	W. Bowers	W	W. Bowers

[89] GX69 (A1740); Tr. 1355 (Hyatt), 1821-22 (McDaniel), 4654-58, 4816 (Black). But see GX152.1 at 55-58 (Andrews Dep.) (claims W.N. Payton, a black, was also recommended; our table accepts the district court's finding that only McDaniel was recommended).

[90] GX69 (A1740); Tr. 5550 (Dew).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Stokes[91]	1973	J. Barnes	W	J. Barnes
		M.B. Wright	W	
		C.J. Cameron	W	
Catawba[92]	1972	E. Nolley	W	E. Nolley
Davidson[93]	1972	W.C. Holtzman	W	W.C. Holtzman
		W. Johnson	W	
		L. Smith	W	
Tyrrell[94]	1971	F. Rivers	W	F. Rivers

[91] GX69 (A1740).

[92] GX69 (A1740).

[93] GX69 (A1740); GX 150.1 at 3-5 (Dew Dep.).

[94] GX69 (A1740).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Nash[95]	1971	W. Shackelford	W	W. Shackelford
Durham[96]	1971	C. Hodges	B	C. Hodges
Harnett[97]	1971	J. Goff	W	J. Goff
		C. Jernigan	W	C. Jernigan
Gates[98]	1970	Z. Harrell	W	Z. Harrell
		C.M. Grimes	B	
		Mr. Baker	W	Mr. Baker

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[95] GX69 (A1740).

[96] GX69 (A1740); A. 1006, TR. 4377 (Blalock); Tr. 1324-25 (Hyatt).

[97] GX69 (A1740); A. 795, Tr. 3669 (Blalock).

[98] GX69 (A1740); A. 1006, Tr. 4377 (Blalock); Tr. 983-85 (Crimes), 1310, 1316-17 (Hyatt); GX148.1 at 46-8, 85, addendum item 23 (Jones Dep.).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Mecklenburg[99]	1970	P. Haas	W	P. Haas
		M. Irving	W	
		B. Bowers	W	
		W. Flynt	W	
Edgecombe[100]	1970	J. Perry	W	J. Perry
Madison[101]	1970	E. Wise	W	E. Wise
Macon[102]	1970	R. Rollins	W	R. Rollins
		G. Conrad		
		E. Wise	W	

[99] GX69 (A1740); GX162.1 at 12-13 (Haas Dep.).

[100] GX69 (A1740).

[101] GX69 (A1741).

[102] GX69 (A1741).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Greene[103]	1970	W. Johnson	W	W. Johnson
		D. Godfrey	B	D. Godfrey
		F. Baker	W	F. Baker
		X	W	X
Moore[104]	1970	T. Baker	W	T. Baker
Granville[105]	1970	A. Hardee	W	A. Hardee
Perquimans[106]	1970	R. Bryant	W	R. Bryant

[103] GX69 (A1741); Tr. 2248-49, 2252, 2264-66 (Godfrey); GX151.1 at 30-32 (Dobbins Dep.).

[104] GX69 (A1741).

[105] GX69 (A1741); Tr. 1736-37 (Lloyd).

[106] GX69 (A1741); Tr. 828-9 (Strowd).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Transylvania[107]	1970	J. Purser	W	J. Purser
Yancey[108]	1970	W. Bledsoe	W	W. Bledsoe
Henderson[109]	1970	G. Westmoreland	W	G. Westmoreland
Avery[110]	1970	W.W. Avery L. Miller W. Richardson	W	W.W. Avery

[107] GX69 (A1741).

[108] GX69 (A1741).

[109] GX69 (A1741).

[110] GX69 (A1741).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Montgomery[111]	1970	R. Wesson	W	R. Wesson
Chowan[112]	1970	R. Thompson	W	R. Thompson
Craven[113]	1970	E. Simpson	W	E. Simpson
Yadkin[114]	1969	S. Young	W	S. Young
Pitt[115]	1969	E. Yancey	W	E. Yancey

[111] GX69 (A1741). P. E. Bazemore was informed he would be recommended to the county but withdrew due to salary considerations before any action was taken. Tr. 3825-26 (Blalock).

[112] GX69 (A1741). See also Tr. 827 (Strowd) (Thompson sent to Chowan county unwillingly - more like a transfer than open recruitment).

[113] GX69 (A1741).

[114] GX69 (A1741); GX 150.1 at 32-35 (Dew Dep.).

[115] GX69 (A1741).

Chart 30

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
Camden [116]	1969	G. Sawyer	W	G. Sawyer
Hertford [117]	1969	E. Register	W	E. Register
Alleghany [118]	1969	W. Corbin	W	W. Corbin
Alleghany [119]	1969	R. Murdock	W	R. Murdock
Orange [120]	1969	E. Pierce	W	E. Pierce

(Continued)

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[116] GX69 (A1741).

[117] GX69 (A1741).

[118] GX69 (A1741); GX150.1 at 32-35 (Dew Dep.).

[119] GX69 (A1741); GX150.1 at 32-35 (Dew Dep.).

[120] GX69 (A1742); A. 795, Tr. 3669 (Blalock); Tr. 1309-10, 1318 (Hyatt), 1417 (McNeil), 6342 (Woodard); GX152.1 at 55-58 (Andrews Dep.).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		F. Emory	B	F. Emory (?)
		S.N. Shelton	B	S.N. Shelton
		B. Woodard	W	
Union [121]	1969	J. Stacy	W	J. Stacy
Cumberland [122]	1969	B. Woodard	W	B. Woodard
		B.T. McNeil	B	B.T. McNeil
		D. Proctor	W	D. Proctor
Alexander [123]	1968	H. Ramseur	W	H. Ramseur

(Continued)

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[121] GX69 (A1742).

[122] GX69 (A1742); Tr. 5837-38 (Dobbins; GX151.1 at 33-34 (Dobbins Dep.).

[123] GX69 (A1742); Tr. 1297 (Hyatt), 1828, 1819-20, 1838 (McDaniel).

COUNTY	YEAR	APPLICATIONS	RACE	RECOMMENDATION
		G. McDaniel	B	G. McDaniel
		X	W	X
		Y		Y
Carteret[124]	1968	J. Bunce	W	J. Bunce
Warren[125]	1968	L. Hardage	W	L. Hardage
		L.C. Cooper	B	L.C. Cooper
Guildford[126]	1968	J. Crawfod	W	J. Crawfod
Tyrrell[127]	1968	M. Goodwin	W	M. Goodwin

[124] GX69 (A1742).

[125] GX69 (A1742); Tr. 1309-10, 1322 (Hyatt), 1887-90 (Cooper), 3855-56 (Blalock), 6342 (Woodard); GX152.1 at 55-58 (Andrews Dep.).

[126] GX69 (A1742).

[127] GX69 (A1742).

	Applications		Recommendations	
	B	W	B	W
1968-71	8	45	7	40
1972-81	23	213	9	91
1968-81	31	258	16	131

An analysis of the above data for the years 1968-71 shows 8 black applications with 7 approvals and 45 white applications with 40 approvals, a black approval rate of 87.5% and a white approval rate of 88.9%. The black approval rate was 98.4% of the white. For 1972-81 there were 23 black applications with 9 approvals and 213 white applications with 91 approvals, a black approval rate of 39.1% and a white approval rate of 42.7%. The black approval rate was 91.6% of the white. For the entire period 1968-81 there were 31 black applications with 16 approvals and 258 white applications with 131 approvals,

a black approval rate of 51.6% and a white approval rate of 50.8%. The black approval rate was 101.6% of the white. Thus, considering all of the data which we have for all of the applications shows that for the entire period 1968-81 black applications were approved at a slightly higher rate than were the white applications, and in neither the 1968-71 period no the 1972-81 period, breaking down the data, was the black approval rate lower than 91.6% of the white. Certainly all of this data for either of the two shorter periods, or for the entire period under consideration, is well within the EEOC guideline.

Hazelwood, p.308, n.13, describes applicant flow data as "very relevant," and New York Transit Authority v. Beazer, 440 U.S. 568 (1979), at least expresses a preference for, and perhaps requires, applicant flow data in preference to more

general data. Applicant flow data has been described as the most direct route to proof of racial discrimination in hiring in Hester v. Southern Railway Co., 497 F.2d 1374 (5th cir. 1974), and in United States v. County of Fairfax, Va., 629 F.2d 932, 940 (4th Cir. 1980), we reasoned that "applicant flow data are normally highly relevant." In this case, we think the probative value of the applicant flow data far outweighs the evidentiary value of naked statistics consisting only of numbers of vacancies and the successful applicant by race. Other than the tables we have set forth above and our earlier discussion of vacancies and appointments, there is no other statistical evidence in the record. There is also no finding of any case of discrimination against an individual who sought the position of County Chairman.

When the complete applicant flow data is analyzed, far from showing any discrimination in the appointments to County Chairmen, the only conclusion it will permit is that the Extension Service made its employment decisions with respect to County Chairmen in as evenhanded a way as could be imagined or sought for within reasons. The essence of the analysis of all the applications is that black applications for the position were approved at about the same rate as were white applications. If we assume that a prima facie case was made by the naked statistics consisting of vacancies and successful applicants from 1968 through 1987, it has been completely refuted by consideration of all of the applications, and even if the burden was upon the Extension Service to prove that its employment decisions were free from racial discrimination, it has done so.

We have considered the remaining assignments of error and are of opinion[128] they are without merit.

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[128] The dissent takes issue with the failure of the Extension Service to affirmatively integrate the entirely voluntary membership of local 4-H and Extension Homemaker Clubs in racially mixed communities. The balance of all activities are completely integrated. Absent proof of alleged racial discrimination, the mere existence of all white and all black 4-H and Extension Homemaker Clubs in some racially mixed communities violates neither Title VI nor the equal protection clause of the fourteenth amendment. The record is totally devoid of any proof of discrimination with respect to services provided by any 4-H or Extension Homemaker Club. Moreover, the record shows no proof of any discrimination with respect to membership in any Extension Homemaker Club. While the record indicates one incident in which a voluntary worker told a black child he was not welcome in a white 4-H club the Extension Service at once removed the voluntary worker and admitted the black child to membership in the 4-H club. Especially since the plaintiffs failed to prove their allegations of discrimination, the district court correctly denied the plaintiffs' claim with respect to the alleged affirmative duty to require integrated membership in local Extenshion Homemaker and 4-H Clubs in racially mixed communities.

Even assuming that the record contained evidence of discrimination, it

The judgment of the district court is accordingly

AFFIRMED

PHILLIPS, Circuit Judge, concurring in part and dissenting in part:

I dissent from so much of the judgment and the majority opinion as affirms dismissal of the salary and 4-H Club claims. As to both of those I would find reversible error and remand for further proceedings. I concur in the balance of the judgment.

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would yet be doubtful if plaintiffs are entitled to the relief sought because no evidence in the record exists to show that any plaintiff was denied membership in, or services of, any Extension Homemaker Club or 4-H Club. Consequently, if any party has a complaint it would seem to be the United States, which, significantly, chose not to appeal this issue. We do not decide that issue in this case, however, because the total absence of proof is fatal to plaintiffs' claim.

I.

With regard to the salary discrimination claim, I would hold that the district court erred in its refusal to certify the class ultimately sought by the private plaintiffs; in its decision on the merits that no discriminatory "pattern or practice" had been proved; and in its rejection of the individual claims following its "no pattern or practice" conclusion.

A.

The individual plaintiffs' challenge to the district court's refusal to certify a class consisting of "all black employees of [the Extension Service] on and after November 18, 1971," the date of commencment of the action, is well taken.

There was no possible basis for declining ultimately to certify such a class.

It clearly met the numerosity requirement. The number of black professional employees has been more than one hundred in each of the years involved. The proposed class would be even larger because of turnover during these years. These figures were undisputed.

The other basic criteria for class certification -- commonality of issues, typicality of claims, adequacy of representation -- were equally well established. The district court's refusal, early and late, to certify the class action was, however, obviously based upon a perception that these criteria were not met. Its stated reasons were two. Neither bears scrutiny.

The first was the court's apparent view, confirmed finally by its "no pattern

or practice" conclusion on the merits, that the focus of decisions on salary matters was so far decentralized to the county level that a class action alleging a pattern or practice multi-county in its reach was not warranted. Citing to this court's decision in Hill v. Western Electric Co., 596 F.2d 99, 102 (4th Cir.a 1979) (Hill I), the court concluded that "in employment discrimination cases ... all the plaintiff representatives and all the class members must be from the same work facility ...," and that here "the representative plaintiffs ... come from roughly thirty of the one hundred counties," so that "[i]n no sense can they be deemed to work within the same facility...." App. 24.

This misconceived the holding of Hill I. That case laid down no per se rule preventing class certification in any multi-facility case (even assuming that

the employment relationship here is sufficiently like that in the multi-facility industrial setting of Hill to warrant comparable general treatment). Hill simply applied to the multi-facility setting of that case the general rule that claims of representative plaintiffs must be typical of those of the class, that the representatives must also be situated adequately to represent the interests of class members, and that these criteria, along with the commonality of issues criterion, were not met where multiple facilities were essentially autonomous in respect of the employment decisions directly in issue. This was made plain in our later decision in Stastny v. Southern Bell Telephone and Telegraph Co., 528 F.2d 267 (4th Cir. 1980). There, though certification was again found improper in a multi-facility setting, it was emphasized that the reason was not the setting

itself, but the fact of facility autonomy. Id. at 277, 279 & n.9.

Here, unlike the situations in both Hill I and Stastny, there was abundant proof, both preliminarily and increasingly during the course of trial on the merits, that despite local county contributions to salaries, hence some county-level participation in the salary decisions in issue, the dominant control over total salary levels lay ultimatey in the state-level Extension Service. Thus, although it was undisputed that the level of county contributions to the salaries in question varied over the state, it was also clear from the evidence that ultimate salary level determinations, even of those putative class members working at the county level, were, as a matter of standard practice, subject to approval by Extension Service officials. This is revealed most dramatically in the recogni-

tion by Extension Service officials in 1971 that the race-based salary gaps dating back to pre-1965 overtly discriminatory practices must in prudence and by law now somehow be closed. Those officials plainly recognized and acted upon this necessity as a matter of Extension Service responsibility.

From this it was clear from the outset of this litigation, and only became clearer as it proceeded, cf. Stastny, 628 F.2d at 276, that the dominant issue of fact and law respecting the salaries of putative class members was not-whether there was significant state-level control over those salary levels; that was beyond dispute. The only possibly disputable issue was whether that control was exercised in racially discriminatory ways in accordance with a pattern or practice similarly affecting all members of the putative class. Indeed, in the final

analysis, the district court, in rejecting the "pattern or practice" claims advanced by the individual plaintiffs, recognized the claim's unmistakably appropriate class-action basis by referring to it as a "class claim."

Which leds to the second, and probably more critical, basis for the district court's refusal to certify a salary-claim class. This was the court's stated perception that once the Government had intervened with its own "pattern or practice" claim respecting salaries, the private party class action question was essentially mooted. As the district court saw it, the government's claim, if meritorious, would be as efficacious to the putative class members as would have been a private class action in their behalf.

General Telephone Co. v. EEOC, 446 U.S. 318 (1980), directly refutes this.

General Telephone held that a government pattern or practice suit need not be structured as a Rule 23 class action precisely because to do so would preclude, as class members, individuals who might prefer, and whom Congress intended could, proceed in individual or private class actions, seeking parallel relief. Id. at 333.

It was therefore prejudicial error to decline to certify the salary-claim class sought by plaintiffs.

B.

Whether analyzed from the perspective of the Government's or the private plaintiff's "pattern or practice" claims,[129]

[129] For sake of simplicity, I confine discussion of the salary claims to their grounding in Title VII and the Constitution. The Title VI ground, also available to the Government, must be essentially congruent, being rested on the prohibition against public funding of segregated facilities.

I would then also find reversible error in the district court's rejection of that claim on the merits.

It is helpful at the outset to recall the now familiar features of the two-stage proceeding that has developed under Title VII for the prosecution of "pattern or practice" claims of disparate treatment, whether by private class action or government enforcement action.

In the first stage, the plaintiff need only establish by a preponderance of the evidence that a pattern or practice of disparate treatment has existed as a matter of an employer's regular standard operating procedure. Hazelwood School District v. United States, 433 U.S. 299, 307 (1977); Teamsters v. United States, 431 U.S. 324, 336 (1977); EEOC v. Ford Motor Co., 645 F.2d 183, 197-98 (4th Cir. 1981), rev'd on other grounds, 458 U.S. 219 (1982). At this stage, the plaintiff

need not attempt proof that any particular employees are specific victims of the pattern or practice in order to establish its existence. Teamsters, 431 U.S. at 360. Rather, as is customary, the plaintiff may rely primarily upon statistical evidence, bolstered by such other evidence as he may care to offer. See, e.g., EEOC v. American National Bank, 652 F.2 1176, 1188 (4th Cir. 1981).

Statistical evidence, either alone or in conjunction with other evidence, may carry the plaintiff's burden at this stage, though it is of course subject to rebuttal by demonstration of methodological flaws or inaccuracies. See id. If this burden is carried, the resulting finding of a discriminatory pattern or practice gives rise to an inference that all employees subject to the policy were its victims and are entitled to individually appropriate remedies. Teamsters,

431 U.S. at 362; Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637 (4th Cir. 1978). This leads to the second stage, in which individual claimants may attempt proof of their entitlement to individual remedies. Teamsters, 431 U.S. at 361-62. In this second stage individual claimants are entitled to a presumption that they are victims of the discriminatory pattern or practice established in Stage I, and the burden is thereupon on the employer to prove the contrary. Teamsters, 431 U.S. at 359 n.45; Sledge v. J.P. Stevens & Co., 585 F.2d 637 n.25 (4th Cir. 1978).

(2)

In this case, the district court rejected the Stage I pattern or practice claim and, in consequence, never reached Stage II proceedings. In doing so, its finding that no cognizable pattern or practice of intentional racial discrimina-

tion in salaries had been established was clearly erroneous. This error is traceable to certain misapprehensions of controlling legal principles and to a failure by the court to accord any weight to certain evidence strongly probative of the claim. See Miller v. Mercy Hospital, 720 F.2d 356, 361 (4th Cir. 1983).

Consideration must start with the undisputed fact that prior to the 1965 merger of white and Negro branches of the Extension Service, the salaries of black professionals were intentionally and quite openly simply set lower than those of white colleagues in the same employment positions. The differential was substantial at all levels and was maintained as a matter of general policy that reflected the cold fact -- as testified by an Extension Service official at trial -- that at that time blacks could simply be

hired and retained at lower salaries than could whites in comparable positions.

Following 1965 merger responsive to the Civil Rights Act of 1964, entry-level base salaries for whites and blacks in comparable professional positions were equalized. But substantial average differentials in all positions continued to exist, and the evidence clearly showed that in time these were reflected in the salaries of both pre-1965 and post-1965 hires. As to the former, because the pre-1965 gaps in base salaries had not been closed; as to the latter, because a significant gap developed once pre-1965 hires had been employed long enough to move up from entry level positions. That these dual strands of substantial salary differentials continued well past 1965 and, more critically, well past 1968 (the earliest limitation date applicable to the

salary claim)[130] was established by undisputed evidence.

Perhaps most dramatic was an internal memorandum prepared in 1971 by Dr. Blalock, then assistant director of the Exentsion Service budget, and an employee of the Service in pre-merger days. Presumably as a result of inquiries or self-prompted concerns about the implications of federal law for the continued maintenance of salary differentials, the memorandum first flatly conceded that "salaries for women and non-white men are lower. Our figures verify." This was attributed to several factors: "the competitive market" (recognized as "not

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[130] In addition to the claim under Title VII, which only arose in 1972, the salary claim was based on Title VI, forbidding since 1965 discrimination in programs receiving federal funds, and on constitutional provisions proscribing intentional race discrimination by state action. As to the latter claims, a limitation period of three years, applied to the action which commenced on November 18, 1971.

acceptable as a reason though"); "tradition"; and "less county support for non-white positions."

Based on this, Blalock had urged in 1971 that action should be taken "as quickly as pos[sible] and preferably before our plan went into Washington." He warned:

> Obviously one of the areas where we'll be checked is on salary. Easy to measure and at least see if there appears to be any [differential].

Blalock had then in fact gone so far as to calculate the salary adjustments needed to close the black/white salary differentials,[131] concluding that increases averaging in the range of $800 to $1100 for black professionals would be required.

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[131] The professional work-force then employed by the Extension Service obviously included both pre- and post-merger hires, a fact manifest to Blalock or anyone else knowledgeable as was he about the recent history of the Service.

There is no dispute that Blalock's general assessment of average salary differentials still existing in 1971 was accurate. But the evidence further disclosed, again without dispute, that though some general adjustments were then put into effect, they did not approach those calculated by Blalock as required to close the gaps. The adjustments were not in fact significant so far as redressing existing race-based differentials. For example, plaintiffs' evidence revealed, again without dispute, that the average gap between white and black aricultural agents at all ranks was then reduced by only $85; that the gap between black and white home economics agents actually increased by $13; and that in three of the six categories of professional employees of the Extension service the average differentials increased in 1971 over those obtaining in 1970. Approximately a year

and a half after the 1971 adjustments, an internal analysis by the Extension Service of the salaries being paid its full agents revealed that those of blacks still averaged $455 less than those paid whites with comparable educational levels and tenure.

From 1971 forward, average differentials between the salaries paid black and white professionals continued to decrease. But the evidence is clear that those average differentials were not substantially removed for home economics agents until 1974 and for agricultural agents until 1976.[132]

That these differentials persisted well into the applicable limitations periods was recognized by the district

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[132] If, as plaintiffs plausibly contend, the average differentials should be adjusted by a tensure longevity factor, the gap-closing dates are substantially later, and may not have been closed fully by trial time.

court, as the evidence compelled that it must be. The court observed of the 1971 "adjustments" -- the first undertaken since 1965 -- that they only began to eliminate the differentials that had originated in pre-1965 overt discriminatory policies. And the district court recognized that the pattern of disparities continued well past that time.

There remained of course the question of motive -- whether the clearly established pattern of salary differentials disfavoring blacks was, during the period of its post-1968 existence, "racially premised." See Teamsters, 431 U.S. at 335. While that motive might possibly have been inferred "from the mere fact of [the] differences in treatment," id. n.15, both sides presented additional evidence of motive in the form of regression analyses of statistical data.

For the government as plaintiff, Dr. Charles Mann presented regression analyses he had done for the years 1974, 1975 and 1981. Certain of these used four independent variables to assess effects upon salaries -- race, education, tenure, and job title. His analyses demonstrated sttistically signifiant racial effects for 1974 and 1975, and statistically insignificant racial effects for 1981. Specifically, it was demonstrated that in 1974 the average black professional earned $331 less than a white professional with the same education, tenure and job title; in 1975, $335 less; and in 1981, still $248 less.

A regressional analysis commissioned by the Extension Service was entirely consistent with that of Dr. Mann for the same time period. Using the same independent variables, it demonstrated a racial

effect of $364-$381 disfavoring black professionals as of October 1974.

Dr. Giesbrecht, an expert witness for the defendants, presented mutliple regression analyses for 1975 and 1981. His results were also consistent with those of Dr. Mann. Using race, education, tenure and job level as indpendent variables, they demonstrated a statistically significant racial effect of $384 for the year 1975; a statistically insignificant racial effect of $310 for 1981. Giesbrecht also presented regression analyses for the same years that added as an independent variable analyses for the same years that added as an independent variable "quartile rankings" that reflected job performance evaluation. For 1975, using this variable in addition to the others increased the race effect to $475; for 1981, it decreased the effect to a still statistically insignificant $142.

Notwithstanding the consistency of these analyses and the testimony of the experts on both sides that they demonstrated statistically significant salary differentials attributable to race that continued at least to some time after 1975, the district court declined to accord them any probative force.[133] The court reasoned, adopting a specific argument by defendants, that the analyses were fatally flawed by their failure to include nine other indpendent variable sposited by defendants as potentially relevant.[134] At the same time, the court

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[133] The district court's rejection of Dr. Mann's regression analysis also, inevitably, involved rejection of Giesbrecht's which concededly employed the same methology and data bases. Supporting the district court's position, the defendants are forced to the position -- which seems clearly taken -- of similarly repudiating their own expert witness testimony.

[134] The suggested variables were as follows:

(1) Performance of agents measured against the agents' plan of work;

apparently rejected as irrelevant to the issue of motive any evidence other than the regression analysis offered by Dr.

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(2) The variations in salaries created by across-the-board state raises with the different percentage of state contributions in each county;

(3) The across-the-board increases in agent salaries by some counties and not in others;

(4) The merit raises provided by the state;

(5) The merit raises provided for by the counties in which Extension Service personnel have no input;

(6) The merit raises provided by the counties with limited or full participation in the merit recommendation by Extension Service personnel;

(7) The range in merit salary increases provided by the counties (0 to 12% in 1981);

(8) Prior and relevant experience; and

(9) Variations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience.

Mann. This appears from the court's conclusion that to the extent plaintiffs had established a prima facie ase "it has only been by viture of ... statistical evidence based on the mutliple regressions of Dr. Mann." Finally, the court concluded that, in any event, the plaintiffs' statistical evidence was undermined by defendants' countering proof of the absence of significant salary differentials.

In all three of these critical determainations, the court was so clearly in error that its ultimate finding of no pattern or practice should not be allowed to stand.

As to the rejection of Mann's regression analyses (and along with it that of defendants' expert) for failure to include a number of other independent variables merely hypothesized by defendants, I completely agree with the

government and the private plaintiffs that to apply such a rule generally would effectively destroy the ability to establish any Title VII pattern or practice claim by this means of proof. There is no authority of which I am aware that applies such a rule. As those parties rightly point out, it will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated by an multiple regression analysis that could be conceived. Merely hypothesizing other possible variables, no matter how rationally, should not suffice where, as here, a statistically significant race coefficient has been demonstrated by a regression analysis employing the most obvious alternative variables of tenure, education, and job position. Leaving out for

the moment the bolstering effect of plaintiffs' non-statistical evidence of a race-based pattern or practice, the effect of the wholly consistent regression analyses here was unmistakably to make out a prima facie case requiring rebuttal by defendants. See Teamsters, 431 U.S. at 360; Chisholm v. United States postal Service, 665 F.2d 482, 496 (4th Cir. 1981). This might have been done, for example, by evidence that the inclusion of other relevant variables would in fact reduce the race-effect coefficient to a

statistically insignificant level. But that simply had not occurred here. For all this record discloses, no one of the variables merely hypothesized by the defendants and relied upon by the court would have had any effect on the race-effect coefficient revealed in the regression analyses of both sides' experts.[135]

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[135] Indeed, one variable -- merit -- merely suggested by defendants as possible explanation for the differential was worked into the regressional analyses. The result, however, was to increase the demonstrated race-effect, rather than decrease it. The Giesbrecht analysis for 1975 incorporated a quartile-ranking variable which presumably reflected merit evaluation. It had the effect indicated.

On this point, the majority opinion's painstaking standard deviation analysis of the effects of quartile rankings on the plaintiffs' claim, slip op. 29-32, does no more than support the district court's rejection of plaintiffs' discrete claim that the ranking system itself was violative of Title VII as an unvalidated test. I am prepared to accept it for that limited purpose without accepting the propriety of the majority's first instance standard deviation analysis of statistical proof based on the size samples here involved, or the majority's apparent

The court also erred in rejecting all evidence other than Mann's regression analysis as probative of a discriminatory

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understanding of the import of the Hazelwood "more than two or three standard deviations" rule. See EEOC v. American National Bank, 652 F.2d at 1192-93 ("Within the range of one to three standard deviations ... we do not see how a acourt can properly find the ... hypothesis [of] discrimination dispelled by [the standard deviation] analysis alone.").

To show, by whatever means, that the quartile ranking system did not itself violate Title VII does not however undercut the probative force of a regression analysis that did not use quartile rankings as an additional independent variable to test for race-effect. In short, that a discriminatory race-effect could not be traced solely to the quartile ranking system obviously does not also show that discrimination did not exist by virtue of other specifically identifiable causes or, indeed, unidentifiable causes. The majority, in fact, asserts that the race-effect demonstrated by all the regression analyses could be attributable only to the quartile ranking system or to the "lingering effects of pre-Act discrimination." Slip op. 33. As well be shown, the fact that such lingering effects are traceable to pre-Act discrimination does not, as the majority believes, insulate it as a discriminatory post-act practice.

pattern or practice. This dissenting opinion is no place to recapitulate all the other evidence that bolstered the inference of intentional discrimination past 1968. But such evidence abounds in the record. Perhaps most practically compelling is the concession by Blalock in 1971 that the pattern of overt race-based discrimination that originated in pre-merger days was then still in effect, in part at least because of "tradition." Coupled with this telling concession against interest was that responsible official's flat warning at the time that remedial action might in prudence by required to avoid difficulty with federal reviewing authorities. It is hard to imagine more weighty evidence of knowing, intentional continuation of acknowledged discriminatory policies.

Other evidence of a purposeful continuation of the practice well past

1971 was presumably disregarded by the district court in view of its stated reliance alone on the Mann regression analysis. Most critical were numerous specific examples of disparate pay between white and black professionals holding the same job positions, having comparable levels of tenure and education, and working in the same county offices at the same time.[136]

The continued existence of this clear pattern was in fact never sought to be rebutted on any basis that could conceivably have been thought to explain the pattern itself, as opposed to occasional specific examples. The defendants' suggestion that somehow merit (as reflected in the quartile rankings), or longevity, or a variance in salary supplements from county to county adequately and fully

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[136] Much of this evidence came directly from county-level Extension Service records.

explained the continued existence of so widespread and substantial a pattern of disparate pay concededly race-based in its origins indeed bordered on the frivolous. On each of these points, the plaintiffs' evidence included numerous illustrations of pay differentials that could not be explained on any of the non-racial grounds merely hypothesized by defendants.[137]

Indeed, anyone looking at this whole record, including some of the district court's own findings and observations could in fairness take only one view of it. It is this: that of course the general pattern of pre-1965 overt discri-

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[137] This evidence, incidentally, completely undercuts the defendants' suggestion, apparently accepted by both the district court and the majority on this appeal, that the regression analyses were flawed because of different salary levels from county to county. The plaintiffs' evidence indisputably established that the general pattern of average differentials existed in both "high-pay" and "low-pay" counties.

mination in salary continued in substantial, if gradually diminishing, degree until at least 1976 and perhaps beyond; that of course, the responsible officials of the Extension Service with responsibility and authority in the matter knew that the pattern continued during that time and that to some degree at least it included a carry-over race-based component from its pre-1965 origins; and that of course, so knowing, those officials allowed it to continue for a time when it lay within their power to remedy it.

If this be, as I am persuaded, the only rational assessment to be made of the evidence in this record, the question arises, and in fairness must be addressed: how then did the district court and the majority here fail so to assess it? In my judgment, the answers are readily found in misapprehensions of controlling legal principle, and not in any essential

disagreement with my assessment of the facts clearly proven.

I identify three such basic legal misapprehensions by the district court.

The first has already been alluded to in Part IA: the court's perception that the salary pattern or practice alleged had not been shown to be class-wide in its reach because of county automomy in salary matters. For reasons there indicated, this view is simply erroneous as a matter of law -- whether applied to the class certification or merits issues.

The second has to do with the relevant time frame within which the existence of a pattern or practice of salary discrimination was to be assessed. That time frame commenced at least as far back as 1972 for the Title VII claims; it commenced as far back as 1968 for the constitutional and Title VI claims. While the district court specifically recognized

this, its findings and conclusions unmistakably reveal at least a preoccupation, as the plaintiffs suggest, or perhaps a sole concern with the question whether a discriminatory pattern or practice continued to exist at the time of trial in 1981.

For example, the court rejected, presumably as irrelevant, a government comparison of black and white salaries earned in 1973 on the basis that it involved differences existing "about ten years ago," though this was well within all the applicable limitation periods. Again, the court in disussing the "seeming salary disparities" revealed by plaintiffs' regression analyses over the period 1974-1981, concluded that on the basis of defendants' evidence respecting the years 1976-1981, the seeming disparities had been adequately explained. This defendants' evidence obviously had nothing to

do with the years 1974-1975 covered by plaintiffs' regressional analysis; and it certainly spoke not at all to the salary pattern before 1974, a time well within the limitation period. The impression is strongly conveyed that the court simply did not consider that it might be compelled to find a discriminatory pattern or practice of discrimination existing for at least some time after 1972 (or possibly 1968) even though it had been rectified by the time of trial. This of course was an erroneous view of the law.[138]

The third misapprehension has, possibly, to do with the nature of the discriminatory intent or motive that must be found to establish a pattern or

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[138] Of course, conditions existing as of trial time would have been highly relevant to the question of the propriety and scope of declaratory and injunctive relief. But plaintiffs' claims, both those of the private parties and of the Government, were of course not limited to prospective relief.

practice claim and, possibly, with legal justifications that might excuse any discrimintory intent found to exist. In a frank and revealing passage, the court opined:

> The Extension Service's problem of bringing black and white salaries into line has been similar to that which faced most business enterprises with a prior history of racial discrimination following the passage of the Civil Rights Act of 1964. Just as it had been found in the area of education that there is no such thing as instant integration, it was soon found in the field of business and industry that there is no such thing as instant equality in employment. Without risking serious disruption of a business by prohibitively costly budgetary alterations and a possible practice of wholesale reverse discrimination it was soon recognized (though not always by the courts) that the adjustments mandated by the law simply could not be made overnight. The dilemma of the Extension Service was further compounded by the fact that its operating funds come from three separate political entities each of which retains a voice

in all major employment decisions.

This passage unmistakably reveals, first off, the court's recognition that a pattern of disparate treatment had been proven; the proferred legal justification or excuse for it that follows would not otherwise be required. Beyond that, it suggests two possible views of the legal significance of the pattern that are equally erroneous in law.

The first is that the intent required to prove a discrimiatory pattern or practice could not be found in the mere continuation of a pattern or practice not originated by those presently charged with its existence. The other is that in any event even the intentional continuation of such a pattern or practice would be legally justified by the extreme difficulties of abandoning it.

Whatever the practical wisdom and accuracy of the court's observations, I agree with plaintiffs' position that nothing in controlling law supports its legal premises. Only those erroneous premises rather than the court's actual fact findings could possibly explain the court's conclusion that no pattern of illegal salary discrimination existed for periods extending well into covered time periods.

This court's opinion affirming the district court's rejection of the salary discrimination claim is, with respect, similarly flawed with basic legal error. Relying principally upon Hazelwood and United Airlines v. Evans, 43 U.S. 533 (1977), the majority holds, in effect, that because the pattern of discriminatory salaries here challenged originated before applicable provisions of the Civil Rights

Act made their payment illegal,[139] any "lingering effects" of that earlier pattern cannot (presumably on an indefinitely maintained basis) be considered in assessing a challenge to post-act continuation of that pattern.[140]

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[139] Plaintiffs' claims were also grounded in the fourteenth amendment, whose effective date of course long predated the origins of the challenged salary pattern. While the majority does not address this point, I assume, for purposes of this discussion, that the Evans principle would apply as well to constitutional claims, so far as it had any application. But, in line with the ensuing discussion in text, I think Evans no more precludes proof of a post-limitation pattern of salary discrimination rooted in a pattern that originated in a pre-limitation period, than Hazelwood precludes proof of a post-Act pattern of salary discrimintion that carries forward differentials originating in the pre-Act period.

For sake of simplicity, I discuss the point in terms alone of the ability to prove a Title VII claim of continuing violation by a pattern or practice that originated pre-Act.

[140] The majority also relies upon this theory to dismiss the probative force of the regression analyses showing statistically significant race effects in 1974 and 1975 salary structures. In the majority's view, the fact that the data used in those

Hazelwood and Evans indeed made it clear that an employer cannot be found liable, or sanctioned with remedy, for employment decisions made before they were declared illegal or as to which the claimant has lost any right of action by lapse of time. For this reason it is generally true that, as the catch-phrase has it, Title VII imposed "no obligation to catch-up," i.e., affirmatively to remedy present effects of pre-Act discrimination, whether in composing a work

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analyses included pre-Act as well as post-Act hires flawed the analyses, since pre-Act hiring decisions could not properly be considered in assessing Title VII liability. Slip op. at 9. With all respect, that the salary data included salaries paid after 1974 to pre-Act hires is beside the point. The claim here is of a post-Act discriminatory pattern or practice in salary payments, not in hiring or work-force composition. That some of the employees claiming post-Act discrimination in salary payments were hired (and paid discriminatory salaries) pre-Act, does not make irrelevant evidence that they, with others, were paid discriminatory salaries post-Act.

force or otherwise. But those cases cannot be though to insulate employment decisions that presently are illegal on the basis that at one time comparable decisions were legal when made by the particular employer. It is therefore one thing to say that an employer who upon the effective date of Title VII finds itself with a racially unbalanced work-force need not act affirmatively to redress the balance; and quite another to say that it may also continue to make discriminatory hiring decisions because it was by that means that its present work force was composed. It may not, in short, under the Hazelwood/Evans principle continue practices now violative simply because at one time they were not.

So, in this case, though there might theoretically be some question as to exactly when the challenged post-Act pattern or practice of salary discrimina-

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tion could be said to have originated, there can be no doubt that it was well established in its challenged form within applicable limitation periods. Indeed, with respect to pay and other "condition of employment" claims, as opposed to hiring and other work-force composition claims, it may well be argued that the "no-catch-up" principle simply has no logical application. Certainly, for example, it could not be contended that an employer could continue to maintain

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[141] Presumably, a wholly post-Act "pattern or practice" could only be found in specific post-Act employment decisions -- either in the form of a general decision to continue a pre=Act pattern or practice as a matter of deliberate post-Act judgment, or in the form of a sufficient number of discrete decisions respecting individual employees to indicate a post-Act pattern or practice that merely continued pre-Act policies into the new period. These can be seen as "continuing" violations, in that they continue pre-Act discrimination rather than merely perpetuate "past effects," see, e.g., Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980).

segregated dining facilities simply because they originated pre-Act.

B.

As both the Government and the private plaintiffs rightly point out, the district court's erroneous conclusion that no pattern or practice had been established made also erroneous its denial of the claims of individual plaintiffs. Those plaintiffs, as members of the class sought to be certified (or as employees properly represented by the Government in its enforcement action) were entitled to have their claims determined with benefit of the "Teamsters presumption," see Teamsters, 43 U.S. at 359 n.45, a benefit denied them by the court's error. They are entitled, therefore, to have the judgments against them on their individual claims reversed and to participate as claimants in Stage II back-pay proceed-

ings. Sledge v. J.P. Stevens & Co., 585 F.2d 625, 637-38 (4th Cir. 1978).

C.

Because of the district court's errors in failng to apply controlling principles of law to the indisputable evidence that defendants knowingly continued a pattern or practice of making and enforcing racially discriminatory salary decisions at least until 1976, I would reverse and remand. The court should be directed to enter judgment declaring that an illegal pattern or practice existed from 1968 until at least 1976, or such later date as the court might now find, and ordering Stage II back-pay proceedings in which individual employees within the class sought to be certified, including the individual plaintiffs whose claims were denied, might prosecute claims with benefit of the

Teamsters-presumption. See EEOC v. American National Bank, 652 F.2d at 1201.

III.

The district court also erred in dismissing on the merits[142] plaintiffs' claim of constitutional and statutory violations in the state's maintenance of racially segregated 4-H and Extension Homemaker Clubs.

The salient facts, essentially undisputed, are these. The 4-H program is a major Extension Service activity, which receives substantial state and federal

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[142] The court refused as well to certify a class of 4-H Club claimants on the same principal basis that it denied the claim on the merits: that no black member of the putative class had actually been denied membership in an all-white club. On this view, there literally was no class of persons who could make the claim the court identified. As later developed on my discussion of the merits of the claim, that simply misconceives the nature of plaintiffs' claim respecting the 4-H Clubs.

funding for whose administration the Extension Service is accountable. One of the program's critical features is the encouragement, financial support, and servicing of voluntarily organized 4-H and Extension Homemaker Clubs throughout the state.

Before 1965 these clubs were deliberately organized and operated, as was the Extension Service in all its features, on a racially segregated basis. In 1965, following passage of the 1964 Civil Rights Act, the Extension Service began and has since intermittently adopted a series of essentially ineffectual measure facially designed to "integrate" pre-1965 clubs and to avoid racial discrimination in the organization and operation of new clubs, as a part of its general program of mandated compliance with the requirement of Title VI of the Act.

The history of the Extension Service's adoption, rejection, compromise, interpretation and administration of those anti-discrimination measures is a checkered and confused one. Its ultimate form, however, can fairly be characterized as a freedom of choice approach to the membership composition of these clubs. Affirmative efforts to achieve effective integration of pre-1965 clubs and to avoid segregation in post-1965 clubs have consisted, on any fair assessment of this record, of announcing to Extension Service agents and to the public that the clubs are open to members of all races and forbidding the denial of membership to any applicant on the basis of race.

The actual effects of these desegregation compliance policies have, however, been minimal so far as the racial composition of local clubs is concerned.[143]

[143] The only claim of illegal discrimination

Despite the emergence of 1972 of some new clubs integrated to some extent, the numbers of such clubs in relation to all-black and all-white clubs remained quite low. For example, in that year there were 22 Homemaker Clubs integrated to some degree, but still 1,378 clubs all white and 466 all non-white. Since 1965, the number of all-white 4-H Clubs has declined by only 8%; the number of single-race 4-H Clubs in ethnically mixed communities has declined by less than 2% since 1972.

As the plaintiffs rightly point out, the district court did not find, nor do the defendants make any serious claim,

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in administration of the 4-H program now pressed by plaintiffs relates to the continuation of these segregated local clubs. As plaintiffs themselves point out, the Extension Service has been able quite effectively to remove the vestiges of discriminatory practice in all other aspects of the Program, including, for example, the operation of summer camps. See note 17, infra.

that the dual system of single race club membership required by the state before 1965 had been significantly disestablished at the time of trial. The court instead concluded, and the defendants here urge in effect, that this constituted no violation of applicable constitutional or statutory law. I disagree.

The district court essentially concluded that so long as all-white clubs were not proven at the time of trial to be rejecting black applicants on the basis of race, no violation either of Title VI or of the Constitution had been proven. This either misapprehended the nature of the plaintiffs' claims, or of the applicable law, or both.

The plaintiffs' claim necessarily has two prongs. The first relates to those present-day single-race clubs that were established before 1965 on a state-imposed segregated basis. As to these, plaintiffs

rely on the fourteenth amendment and on a specific Department of Agriculture regulation promulgated under Title VI and having the force of law:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination. (Emphasis added).

7 C.F.R. §15.3(b)(6)(i). Plaintiffs claim, and I agree, that the evidence clearly shows that the state's essentially hands-off "freedom-of-choice" approach is demonstrably not "affirmative action to overcome the effects of prior discrimination," within the contemplation of this specific regulation, and that neither does it comply with affirmative obligations imposed directly by the Fourteenth Amendment to disestablish formerly segregated state-supported facilities.

Such action as the state has taken in this respect suffers the same vice as did comparable freedom-of-choice plans adopted in ostensible response to the Supreme Court's mandate in Brown v. Board of Education, 347 U.S. 483 (1954); it has proven not to work -- for the same obvious reasons that school freedom-of-choice plans did not work. See Green v. County School Board, 391 U.S. 430 (1968). For the same reasons that judicial remedies were available to insure the use of "other means" having more "realistic promise" to achieve the end compelled by law and constitution in school desgregation, so should a comparable judicial remedy be available here. See id. at 437.

The other prong of plaintiffs' claim relates to single-race clubs formed since 1965 in communities where there demonstrably exists a potential for mixed-race membership. As to those, the claim is

that the state, through the Extension Service, intentionally countenances the continued organization and operation of these clubs, albeit by private parties, on a segregated basis, notwithstanding it has the means further to cause their desegregation.

That such clubs continue to exist is not disputed. That chance alone could account for their single-race composition is not suggested by anyone. The state's position, essentially accepted by the district court, is that no invidious discrimination could be found as the cause except on the basis of evidence that specific black applicants had been denied membership in all-white clubs. Because the evidence was not forthcoming, the district court rejected any claim of present invidious discrimination.

I believe that the court erred in not addressing the question whether a pattern

of invidious discrimination was nevertheless proven independently of specific rejection of black applicants for club membership. That necessary inquiry -- which should be made first instance by the district court -- was simply avoided by the court's view that invidious discrimination could only be proven in the one way not proven. This clearly misapprenhended controlling legal precedents for the means of proving invidious discrimination in this and related contexts. See e.g., EEOC v. American National Bank, 652 F.2d at

1198-99 (discrimination in hiring by word-of-mouth recruitment by presently employed whites); Lea v. Cone Mills Corp., 301 F. Supp. 97, 102 (M.D.N.C. 1969), aff'd in relevant part, 483 F.2d 86 (4th Cir. 1971) (discrimination in hiring by "chilling").

I would reverse the district court's judgment respecting the 4-H Club claim, the remand for further proceedings. As to those clubs which demonstrably existed on a state-imposed segregated basis prior to the effective date of Title VI[144] I would direct entry of a remedial decree which required the state to "come forward with a

[144] Though the composition of particular clubs has of course changed and varied in size over time, so that some difficulty might be encoutered in establishing the continuity of a particular club from its origins in state-imposed segregation, the difficulty of proof is an evidentiary one no greater than that encountered in many other contexts. The defendants' veiled suggestions that the difficulty makes a workable remedy impossible is disingenuous.

new plan ... that promise[s] realistically," see Green v. County School Board, 391 U.S. at 439, to work in achieving the fullest measure of desgregation of those clubs practically possible; with submission of that plan to the court required for review and approval as a condition to further receipt of public funds.[145]

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[145] The district court may well have been led into the error of outright rejection of this claim by assuming that only a much more Draconian remedy than the one suggested here as the appropriate one was possible. In another candid and revealing passage, the court opined

> in North Carolina as well as all other states integration of the races more frequently than not meets with strong resistence. The choice thus posed is whether it is better that the Extension Service continue to provide its much needed services to well over 100,000 North Carolina club members while striving to achieve full integration of the clubs or that it withdraw such services altogether as the government would have it do. The Extension Service has opted for the former, and in so doing this court does not perceive that it has violated the rights of anyone under any law.

As to those all-white clubs formed since the effective date of Title VI that now exist in communities with potential for mixed-race membership, I would direct

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This misconceived both the nature of the plaintiffs' claim and the remedial powers available to vindicate that claim if established. Within the equitable powers of the district court lay a much wider range of possible injunctive remedies than the immediate withdrawal of all state services to all 4-H Clubs found not presently desegregated to a specific degree. Neither Title VI nor the equal protection clause required a specific degree of desegregation of these clubs at any specific time. They required only that intentional segregation be neither directly effectuated nor symbiotically encouraged by state action and that state-imposed segregation still in place be rooted out by state remedial action to the maximum extent and as speedily as possible. As plaintiffs cogently observe, the district court's assessment that no effort by the state beyond a benign freedom of choice plan could be required without risking destruction of the 4-H Clubs is belied by, among other things, the successful efforts by the Extension Service to desegregate all its other activities, including many involving 4-H Club members. The district court underestimated its powers to insure compliance by means less drastic and more adaptable to legitimate state interest than the horrible alternatives suggested by defendants as the only available ones.

specific reconsideration, on a re-opened record, of the claim that they are so maintained by invidiously discriminatory practices knowingly countenanced and encouraged by the state through the Extension Service. In considering that claim, I would direct that evidence other than specific rejection of black applicants be considered and might suffice, if of sufficient probative force, to establish it. And I would direct that if such a claim were established, the court should enter a remedial decree comparable to that above described.

For the reasons, I dissent to the extent indicated.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 82-1873, et al

P. E. BAZEMORE, et al.,

Appellants

v.

WILLIAM C. FRIDAY,
etc., et al.,

Appellees

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Winter, Phillips, Murnaghan, Sprouse and Ervin voted to grant rehearing en banc, while Judges Russell, Widener, Hall, Chapman and Sneeden voted to deny rehearing en banc. Judge Wilkinson did not participate in the decision in this case.

It is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly **ADJUDGED** and **ORDERED** that the petition for rehearing shall be, and it hereby is, denied.

With the concurrence of Judge Kellam.

FOR THE COURT

Judge Phillips dissents to the denial of rehearing for the reasons expressed in his dissent to the panel opinion.

Supreme Court, U.S.
FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-93

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

P. E. BAZEMORE, *et al.*,
Petitioners

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant *certiorari* to review the fourth circuit's decision that there was no pattern or practice of intentional discrimination in the salary claims of Petitioners when

   a) The salary claims were correctly decided and no pattern or practice of intentional discrimination was found by the district court, and

   b) The statistical regression and data presented was properly rejected by the district court and fourth circuit as being inaccurate and based on inappropriate data?

2. Should this Court grant *certiorari* to review the fourth circuit's decision that there was no pattern or practice of intentional or individual discrimination in connection with the selection of county extension chairmen when

   a) The district court correctly applied the disparate treatment analysis requiring proof of intentional discrimination in connection with its decision on the claims of discrimination in selection of county extension chairmen, and

   b) The selection process for county extension chairmen was not in violation of *Arizona Governing Committee v. Norris*, 73 L.Ed. 2d 1236 (1983).

3. Should this Court grant *certiorari* to review the fourth circuit's decision that there was no violation of Title VI in connection with the North Carolina Agricultural Extension Service's administration of the 4-H and Extension Homemaker Programs when there was no evidence presented that any black recipient or participant was discriminated against in connection with the 4-H or Extension Homemaker programs?

4. Should this Court grant *certiorari* to review the fourth circuit's decision that the district court properly denied certification of this as a class action pursuant to Rule 23, Federal Rules of Civil Procedure when the facts showed that certification was inappropriate here and the case was tried as a pattern or practice disparate treatment case?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. The Salary Claims Were Correctly Decided and Certiorari Should Not Be Granted to Review Them	8
II. The County Extension Chairmen Claims Were Correctly Decided and the Decision Does Not Extend *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982) Nor Violate *Arizona Governing Committee v. Norris*, 73 L.Ed. 2d 1236 (1983)	21
III. The Decision of the Court of Appeals is Not in Conflict With *Green v. School Board of New Kent County*, 391 U.S. 430 (1968)	23
IV. The Decision of the Court of Appeals is Not in Conflict With *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)	26
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Arizona Governing Committee v. Norris, 77 L.Ed 2d 1236 (1983) ..... i, 6, 21
Cooper v. Federal Reserve Bank of Richmond, 467 U.S. ——, 81 L.Ed.2d 718 (1984) 7, 19, 29
Dothard v. Rawlinson, 433 U.S. 312 (1977) 5, 19
EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983) 19
EEOC v. Korn Industries, Inc., 682 F.2d 256 (4th Cir. 1981) 17
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 7, 26, 27
General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982) 6, 17, 21
General Telephone Company of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980) 7, 29
General Telephone Company of Southwest v. Falcon, 457 U.S. 147 (1982) 28
Green v. School Board of New Kent County, 391 U.S. 430 (1968) 23
Hazelwood School District v. United States, 433 U.S. 299 (1977) 4, 10, 17
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ..... *passim*
McDonnell-Douglas v. Green, 411 U.S. 792 (1973) .. 4, 16, 21
Paxman v. Campbell, 612 F.2d 848 (*en banc*) (4th Cir. 1980) 28
Pullman Standard v. Swint, 456 U.S. 273 (1982) .. 4, 17, 21
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 6, 18, 21
United Airlines v. Evans, 431 U.S. 533 (1977) .. 4, 17, 18

Constitution, Statutes and Regulations:

28 U.S.C. § 1291 ..... 7, 26
42 U.S.C. § 1981 ..... 4, 17
42 U.S.C. § 2000d 1
42 U.S.C. § 2000h-2 1
42 U.S.C. § 2000d-1 1
42 U.S.C. § 2000e, *et seq.* 1
Rule 23, Federal Rules of Civil Procedures ..... ii, 7, 27, 29

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action was instituted in the U.S. District Court for the Eastern District of North Carolina on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (NCAES) alleging racial discrimination in employment and the provision of services by NCAES on behalf of 5 purported classes of blacks and indians. The United States intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1.

The United States was permitted to amend its complaint in intervention by Order of the Court on October 9, 1979, to include allegations of a pattern and practice of racial discrimination in alleged violation of Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Class action certification was denied by the Court on October 9, 1979, after discovery closed.

On November 23, 1981, plaintiffs amended their complaint to allege violations of Title VII. The defendants denied all allegations of discrimination. The nonbifurcated trial of this action began on December 7, 1981, and ended on February 12, 1982. Counsel for the United States and plaintiffs, acknowledged this was a disparate treatment case and that they had the burden of proving a policy, pattern and practice of intentional discrimination. (Tr. 10, 13, 16). The plaintiffs and the United States called over 46 witnesses to testify and introduced a multitude of exhibits in support of their pattern and practice and individual claims.

The defendants' case began on December 31, 1981 and the defendants called over 15 witnesses and introduced over 250 exhibits in support of their contention that no pattern or practice of discrimination existed and that the individual plaintiffs were not entitled to relief.

Both the United States and the private plaintiffs called rebuttal witnesses. (Tr. 6411-6616). The transcript consisted of 32 volumes and 6818 pages. Although there was some overlap of exhibits, the defendants introduced 274 exhibits, the plaintiffs 262 and the United States 274.

On August 20, 1982 and September 17, 1982, the Court entered Judgments and Orders dismissing all claims of both the United States and the individual plaintiffs.

In its decision of August 20, 1982, with respect to the pattern and practice claims, the Court found as follows:

(a) That this was not a proper action to be certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. (49a) This Finding was appealed.

(b) That blacks are not discriminated against in geographical employment assignments in NCAES. (53a) This Finding was not appealed.

(c) That NCAES does not discriminate in recruitment of black professional employees (55a) This Finding was not appealed.

(d) That NCAES does not discriminate in hiring black professionals at the county and state levels and NCAES's selection procedures are non-discriminatory. (62a) This Findings was not appealed.

(e) That NCAES does not discriminate in assignments of professional personnel to areas of responsibility (i.e. crops, livestock). (64a). This Finding was appealed.

(f) That NCAES does not discriminate in title promotions of county level professional employees (from assistant to associate to full agent) and the performance evaluation system used in connection with promotions of county level professionals was valid, and non-discriminatory. (74a) This Finding was not appealed.

(g) That NCAES does not discriminate in the selection of county extension chairmen. (101a) This Finding was appealed.

(h) That NCAES does not discriminate in the selection of state level positions such as director, program leaders, specialists, and district chairmen. (106a) This Finding was not appealed.

(i) That NCAES does not discriminate with respect to terms, conditions and privileges of employment. (72a) This Finding was not appealed.

(j) That NCAES does not discriminate in connection with salaries. (150a) This Finding was not appealed.

(k) That NCAES does not discriminate in work assignments. (152a). This Finding was not appealed.

(l) That NCAES has established valid, nondiscriminatory qualifications, tests, selection standards and procedures in hiring and promotion. (158a) This Finding was not appealed.

(m) That NCAES has taken appropriate action to correct the present effects of past racially discriminatory policies and practices. (163a). This Finding was not appealed.

(n) That NCAES provides equal services to minorities (164a). This Finding was not appealed.

(o) That NCAES' services to farmers and other persons are provided on non-racially segregated basis. (164a). This Finding was not appealed.

(p) That NCAES is not in violation of Title VI in the delivery of services to 4-H and Extension Homemaker Clubs. (185a). This Finding was appealed by Petitioners but not by the United States.

(q) That the case was a disparate treatment case, and NCAES did not engage in a pattern or practice of racial discrimination. (205a)

In its decision of September 17, 1982, the Court analyzed the individual claims of 42 plaintiffs and determined that none were entitled to relief.

The United States and Petitioners appealed to the fourth circuit. The United States appealed from only *3* of the 16 adverse rulings on their claims of alleged pattern or practice of discrimination. The private plaintiffs

appealed from only 4 of the foregoing adverse rulings; salaries, county extension chairmen, 4-H and Home Economics and class action denial.

Decision was rendered by the court of appeals on December 10, 1984 affirming the district court's two judgments in all respects. Judge Phillips dissented on three claims, to wit: the 4-H Club claims; class action and salaries. He affirmed in all other respects. Petitions for Rehearing and rehearing *en banc* were denied by an evenly divided court on April 15, 1985.

SUMMARY OF ARGUMENT

A. The court of appeals correctly decided the salary claims of petitioners in this disparate treatment case. The district court properly analyzed all petitioners claims, including salary, by the allocation of proof set for pattern or practice and individual claims of racial discrimination through disparate treatment, which claims require proof of intentional discrimination, be they Title VII or 42 U.S.C. § 1981. The district court and court of appeals correctly followed *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973); *Teamsters v. United States*, 431 U.S. 234 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977) in requiring petitioners to prove their assertions of intentional discrimination. In each instance, petitioners failed to do so. The existence of intentional discrimination is for the trial court to decide. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's two decisions clearly show this was carefully decided on the facts and the facts showed no discriminatory intent.

Petitioners petition this Court with sweeping assertions bearing faint resemblance to the facts. Petitioners have nothing new or important to bring before this Court in connection with any issues, including the salary claims. Petitioners tried this disparate treatment pattern or practice and individual claim case without regard to the particular facts surrounding NCAES, its

special requirements for hiring, staffing and without regard to the real non-discriminatory factors which clearly affect salary differences between all agents irrespective of race. Extension service employees in each of the 100 counties of North Carolina have factors affecting salary that are different from county to county and have nothing to do with race. Petitioners come here asserting the same old arguments which have failed them in the past. There are no "wage scales" involved and petitioners failed to prove intentional discrimination in both pattern or practice and individual salary claims.

NCAES employees are professionals with college degrees required. Each of 100 counties has needs for different training and educational skills for NCAES agents and each county contributes different percentages of each agent's salary and percentages vary annually. NCAES pays the remaining percentage of an agent's salary. Salaries are not now, nor have they ever been, the same except for the minimum starting salary. From initial employment on, salaries of agents vary from county to county depending on performance, percentage of state versus county contribution and many other factors, none of which are racial. App. Exhibit A shows how much salaries vary between agents, with similar salary ranges, in just two years. Race has nothing to do with it. Petitioners submitted inaccurate comparisons and statistics which failed to utilize the proper factors affecting all agents salaries. NCAES refuted and rebutted such evidence and showed it to be inaccurate and lacking in probative weight, which is permissible under standards set by this Court in *Dothard v. Rawlinson*, 433 U.S. 331 (1977) and *Teamsters, supra.* The district court and court of appeals properly rejected such evidence and improper statistics.

B. The district court and the court of appeals correctly rejected claims that the selection of county extension chairmen was discriminatory. Petitioners, utilizing inappropriate comparisons with respect to the selection process of the county extension chairman, the highest

county level position in NCAES, failed to prove their case. The district court, applying allocation of proof set out in *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), analyzed the statistical cases and individual claims against the evidence. Petitioners failed to prove a discriminatory pattern or practice and each individual claim was free from intentional discrimination. Petitioners now assert the decision extends *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1980) and violates *Arizona Governing Board v. Norris*, 73 L.Ed. 2d 1236 (1983). Once again, Petitioners avoid the facts in making their assertions here.

NCAES and each of North Carolina's 100 counties sign an agreement in which both entities become co-employees and both pay a percentage of each county employee's salary. (23a). NCAES recommends prospective employees to the County Commissioners. The decision must be one of joint acceptance. No responsibility is delegated to a third party. (77a). *Norris* is not applicable to this case. Petitioners next misdirected claim is that the circuit court extended *General Building Contractors, supra*, requiring proof of intentional discrimination in section 1981 claims, to Title VII claims. A Title VII disparate treatment case requires proof of intentional discrimination to succeed. *Teamsters, supra.*

C. The district court and the fourth circuit correctly denied Petitioners claims that the NCAES 4-H and Homemaker Extension Club programs were operated in violation of Title VI and on a racially discriminatory basis. Out of over 30,000 voluntary black participants in the 4-H programs in 1980 in North Carolina, not one black person came forward to testify that he or she had ever been subjected to racial discrimination. The same was true for the thousands of black females who were members of Homemaker clubs supported by NCAES. Petitioners attack the decisions by trying to assert that segregation has never been cured. The facts show no "freedom of choice" plan exists here. Both programs are

voluntary and not mandatory public school attendance situations. NCAES affirmatively took action which eradicated pre-1965 segregation in 4-H and Extension Homemaker programs and the proof of the pudding is that out of the thousands of participants in those two programs none came forward to complain or assert any racial discrimination. The United States, understandably, did not appeal these claims.

D. The district court and the fourth circuit properly denied class certification in this case. Petitioners assert *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) was violated by both courts. *Eisen, supra*, dealt with two issues. The first was whether a class action determination was appealable under 28 U.S.C. § 1291 and the second was whether a district court, upon a preliminary hearing on the merits, can require defendants to pay a part of the class notification costs. Neither issue is present in this case and the district court's denial of class certification came before trial on the merits and again, after a ten week trial. The record clearly shows that class action was improper under Rule 23, Federal Rules of Civil Procedure and the district court's decision explains why. The case was tried as a pattern or practice case in which the relief, had Petitioners won, would have been the same as if they had a proper class action, which they did not. Petitioners have pointed to no prejudice to their case by trying them as pattern or practice claims. The same relief is available either way. *General Telephone Company v. EEOC*, 446 U.S. 318 (1980). Even the elements of proving a prima facie case are the same in a pattern or practice case. *Cooper v. Federal Reserve Bank of Richmond*, 81 L.Ed.2d 718 (1984). The facts show that a class action is not appropriate here.

NCAES met the claims of petitioners and the United States head on in the trial of this case, responded to each claim, and showed an organization free from racial discrimination. Certiorari should be denied.

ARGUMENT

I. THE SALARY CLAIMS WERE CORRECTLY DECIDED AND CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THEM.

Petitioners' devote over 53% of the Petition alleging errors by the district court and fourth circuit in connection with denial of their salary claims. Petitioners claim that the decisions (1) allow the use of "racially motivated wage scales" and (2) disregarded the statistical regressions and data submitted by Petitioners in support of their claims of intentional wage discrimination. Petitioners have made blatant assertions as to what the district court and fourth circuit held without providing the Court with the facts surrounding NCAES, its organization, structure, salary process and promotion practices. Knowledge of the NCAES, its organization, structure and salarly process is essential to an analysis here. The district court's opinion is respectfully referred to for a detailed summary of NCAES, its function, salary process, programs, and employment processes. (6a-207a)

It is essential to understand from the outset that NCAES is not a factory assembly line endeavor, nor a corporation whose work force engages in similar tasks in similar work environments at plants and offices located within each of North Carolina's 100 Counties. Petitioners refer to the NCAES salary process as "wage scales" as if this case were a plant setting. Such is not the case.

The district court and the panel majority recognized that no "wage scale" situation exists and no meaningful conclusions as to salaries can be drawn by petitioners' comparing agents' salaries by title, race and tenure across county lines. Both courts correctly understood that such a comparison led to no valid conclusions at all under the facts of this case. North Carolina is divided geographically into 100 counties. Each county is a separate governmental agency with its own elected Board of Commissioners. NCAES and each county enter into a "Memorandum of Understanding" which is a separate

written agreement and which, *inter alia*, governs the hiring of NCAES professional employees within the county and the amount of financial support that particular county will contribute towards the NCAES professional employees' salaries on a percentage basis. NCAES county level professional employees, i.e., agents, receive two checks each month. One is from the NCAES, funded by state and federal funds, and the other from the County. NCAES agents cannot be hired to fill a county agent position without County approval. The salary claims of petitioners focus on county level employees of NCAES. (20a-24a).

The specific needs of each of North Carolina's 100 counties determine the educational background and skills needed in the agents it employs. The minimum educational requirement is a bachelor's degree and skills within subject matter areas such as are needed by a particular county's extension program, to wit: Agriculture, 4-H, Home Economics or CRD. For instance, if a particular county has a large dairy farm population, its agricultural program needs would require an agent with a dairy or animal husbandry educational background or training skills. Thus each county has special needs. (58a-60a)

Why is this so? The answer is simple. North Carolina counties vary greatly in population, rural/urban population, size, racial makeup, topography, agrarian needs and resources. The climate and adaptability of the land for crops, trees, poultry and livestock vary tremendously between counties located within the coastal plain, piedmont and mountain regions of the State. Black agents prior to the 1965 merger only functioned in 51 out of 100 counties and there are counties which have never had black extension agents due to the fact that few blacks reside there and blacks did not apply for extension positions there. (28a-29a, 48a, 192a-193a) No discrimination was found in NCAES assignment, recruitment or promotion of black NCAES employees.

Thus, the qualifications (educational background and skills) of the individual agents required to serve the needs of each county must differ and are in fact different as the record here reveals. (58a-59a) It is undisputed in this case that because of the wide variance among North Carolina's counties, the requirements for extension staff vary greatly from county to county and the needs of a particular county dictate the areas of subject matter responsibility, i.e., livestock, soybeans, etc., extension agents must possess within the particular county. Once an agent is hired to fill a county level professional position, he or she cannot be required to move or transfer by NCAES from one county to the other nor fill a position opening for which that agent is not qualified by education, training or interest to fill. (59a-61a) Each position carries its own special needs depending on the needs of the particular county. Where special qualifications are required to fill particular jobs, comparisons to groups who do not possess such special qualifications are of little probative value. *Hazelwood School District v. United States, supra*, 307-308. Just as the varying needs of each county governs its NCAES professional staff, the variance between each 100 counties in size, population, agriculture and wealth, governs each county's particular ability to financially support its Extension program within the county, including contributions to county agents' salaries. This has always been the case.

Because of this fact, some counties have an ability to pay more of an agent's salary than others out of their own funds and to pay their agents higher salaries. The remainder of each agent's salary comes from state and federal funds. The federal government allocates a sum of money to NCAES each fiscal year. Federal funds are combined with funds from the North Carolina general Assembly for NCAES to support salaries for county extension employees. The NCAES in consultation with the Board of County Commissioners determines what the state share of the agent's salary will be from the federal and state funds and what the county will pay that agent as

its contribution. (20a) The percentage of salary paid by the county and NCAES varies greatly from county to county. These percentages change each year depending on the county's individual ability to pay and interest in the NCAES program within the county. In 1981 the percentage of salaries of local extension staffs that were paid by county funds ranged from a high of 57% in Forsyth County to a low of 18% in Camden County. (110a-113a).

Each county's extension staff is not staffed at the level of others. Each county staff is headed by the County Extension Chairman ("CEC") who is the highest paid NCAES county staff member in the county. The salary received by CEC's varied greatly between counties depending on the county's support. (DX 67-1-67-100) The minimum county staff is 2 and several counties have staffs exceeding ten agents in number. The agent determines whether or not to apply for each vacancy and applicants who do not have the skills and educational background required for the county vacancy are not considered. The district court found that the recruitment and hiring practices of the NCAES were valid and non-discriminatory. (58a-62a)

NCAES sets a minimum entry salary level for all new employees at the Assistant Agent Level with a bachelor's degree and no prior experience. A salary differential is offered to those holding master's degrees. On occasions, due to "market demand" an agent has been employed above the entry level in order to obtain the skills in short supply. There have also been times when prior and relevant experience justified a salary above minimum entry level. (109a) Since 1965, NCAES has set the minimum starting salary for all new county agents uniformly. (383a)

After initial employment, the agent or a County Chairman's salary may be affected at any given time by a great number of factors such as tenure, additional degress, subject matter area of specialty, area of responsi-

bility, job performance and promotion from assistant agent to associate agent to full agent, ability of county to pay, state and county across the board raises, state and county merit increases, market competition for holders of certain educational degrees, and competition between counties for a certain agent's skills. (109a-116a, 133a-136a, 383a-385a) Contrary to petitioner's assertions, these variable factors are real, not imaginary and are supported by the record. (362a)

The position of County Extension Chairman was established in 1962 prior to the enactment of Title VI. (82a-83a) The County Extension Chairman is the top administrative position in each county. (74a, 82a) Petitioners tried to lump CEC salaries in their statistical salary comparisons of other agent's salaries. (136a-138a)

The panel majority noted the difference of the County Extension Chairman in salary and stated:

> "The district court correctly declined to compare or include the salaries of County Chairmen with those of agents. There is about a $4,000.00 average salary difference between chairmen and agent to begin with. The chairman is the head of the county based employees of the Extension Service. He is not routinely promoted from agent; the method of his selection is entirely different, and counting the salaries of the County Chairman together with those of the agents for purposes of analysis could only distort the result. (382a-383a)

The salary paid the chairman sets the *maximum extension salary* pay of any agent for that county. (DX 67-1-67-100, A. 632-633, 2210) Regardless of the starting salary, level, skill, performance or tenure, an agent's maximum will be *capped* by the salary paid to the chairman. There was one exception found in 1981, in Alamance County, where the salary of Ozetta Guye, a black HEA, exceeded that of the Chairman. (DX 67-86) As between County chairmen the salary ranges have always varied thereby directly impacting on the maximum amount of the agents' salaries within the counties. This accounts

for differences among county agents' salaries and has nothing to do with race. Petitioners attempt to direct attention from this. The reason why can be plainly seen from the following facts.

In 1971, chairmen's salaries ranged from lows of $11,601 (Dare) and $11,621 (Avery) to highs of $16,588 (Wake) and $16,646 (Rockingham). In 1976 the range was from low of $16,028 (Dare) to high of $23,931 (Wayne). In 1981, CEC salaries ranged from lows of $20,000 (Stokes, Clay) to highs of $34,577 (Sampson) and $34,588 (Lenoir). (DX-196) As no one under the chairman receives a higher salary on the county level, this is proof positive that salaries vary from county to county because of this factor. It further proves that there are no uniform "wage scales".

App. Exhibit A is a comparison of agents randomly picked within similar salary ranges for 1979 showing state and county contributions and comparing those same persons' salaries the following year. This exhibit clearly shows the variances caused by county/state contributions in a one year period. Race has nothing to do with it.

The salary process is non-discriminatory

The salary process of NCAES conducted annually involves pay raises of only three kinds. The panel majority grasped this fact and stated:

> "At the outset of this part of the discussion, certain matters admitted or found by the district court and not appealed are important to remember. There is no discrimination in hiring. There has been no discrimination in promotion from assistant to associate to full agent. Pay raises of three kinds from whatever source, percentage raises, across the board raises, and merit raises. There is no discrimination in across the board and percentage raises. Everyone gets them . . . ." Id. p. 25, 26) The merit salary process was determined to be nondiscriminatory. (383a)

Another factor which explains differences in salaries is that the percentage of total salary paid by each county

varies from county to county. Percentages ranged from 18% to 57% in 1981. This factor alone causes differences from entry level on with respect to across the board and percentage raises, from state/federal and county funds, regardless of source and from year to year. Race has nothing to do with percentage contributions. (383a)

For example. Two agents both started at $15,000.00 entry level in 1981, and both agents were employed as agricultural agents with agronomy backgrounds. Each was employed to fill a vacancy in a different county. In 1982, the State of North Carolina provided a 5% cost of living increase. The effect would be as follows:

1. Agent A was employed by a county paying 30% of his salary. Thus Agent A's salary was 70% state/federal funds and thus 70% was subject to the 5% cost of living increase. Agent A would receive 5% of 10,500 (70% of 15,000) as an across the board raise. Thus if A received no other raise, A's raise would be $525.00 (5% of 10,500).

2. Agent B was employed by a county paying 57% of his salary. Thus Agent B's salary was 43% state/federal funds and thus 43% was subject to the 5% cost of living increase. Agent B would receive 5% of $6,450 (43% of 15,000) as an across the board raise. Thus if B received no other raise, B's raise would be $322.50 (5% of 6,456), a difference in across the board raise in annual salary for 1982. No other raises considered, A would receive in excess of over $200.00 per year simply as a result of the county percentage factor.

The record shows that every year some counties grant across the board increases in salary and some do not. NCAES does not utilize the funds allocated by the state/federal increases and take state salary money from those counties who support the program to fund county portions of raises in those counties who do not support the program with across the board raises. This factor causes a variance each year. (110a-111a, 135a, 383a) All one has to do is apply a county percentage across the board raise to A and B of different percentages and the margin

in salary could be reduced or widened considerably. Such a factor is not created by imagination or ingenuity of counsel.

Tenure, educational level (i.e., masters or doctorate), size of program and area of skill are factors in an agent's salary, including having a skill which is particularly needed. (109a) Also inflation is a factor which cannot be overlooked in salary analysis. The cost of entrance level hiring has gone up and salaries have to be adjusted upward to keep abreast of starting salaries for assistant, associate and full agent, none of which have anything to do with race and are uniformly set. (115a)

Petitioners criticize these factors as being products of imagination or argument of counsel. These factors are real and non-discriminatory.

Since the merit salary process involves the one area of NCAES pay increases (excluding county merit which is within the county control) which is not across the Board, the process will be addressed briefly in this Response. A discussion of the merit process is contained in the district court's opinion. (113a-116a).

The linchpin of merit salary process is the NCAES Performance Review Guide and Personnel evaluation system conducted annually. The district court found that the NCAES Performance Review Guide was valid and non-discriminatory and that the personnel performance evaluation system within NCAES was valid and non-discriminatory. (154a-158a) The NCAES utilizes the Performance Review Guide and performance evaluation system in determining merit pay increases. Petitioners did not challange the district court's determination that the performance evaluation system was valid and nondiscriminatory. Merit increases are based upon job performance measured by the valid non-discriminatory job performance evaluation system. The amount of merit pay is determined by "quartiling." A discussion of quartiling is contained in the district court's opinion. (112a-114a)

Quartiling is a reflection of an agent's job performance which has been evaluated in a non-discriminatory manner. Both the district court and the panel majority so found from the evidence in this case. (150a, 400a)

In the face of the foregoing, Petitioners seek certiorari on two grounds relating to the salary claims. The first ground is that the decision is in conflict with decisions of this Court and other circuits because NCAES maintained and continued intentionally discriminatory "wage scales." The second is that the district court and panel majority rejected the Petitioners and United States' statisical regression analysis and data in denying salary claims in conflict with decisions of this Court and other circuits. Petitioners assertions are incorrect.

The Intentionally Discriminatory "wage scale" argument is specious

Petitioners argue that the decision holds that Title VII permits an employer to continue to pay blacks less than whites pursuant to intentionally discriminatory "wage scales" established prior to 1965 and that alleged resulting disparities constitute continuing violations of Title VII in conflict with other decisions of the fourth circuit. The opinion does not hold that at all and there is no evidence that NCAES ever established "intentionally discriminatory wage scales" prior to 1965 or at any other time.

This is a disparate treatment case. The district court determined the case to be one of disparate treatment under *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) requiring proof of intentional discrimination in Title VII claims of disparate treatment. In a disparate treatment case proof of discriminatory motive is critical. *Teamsters v. United States, supra*, 335.

The allocation and burden of proof in a Title VII disparate treatment pattern or practice case is governed by *Teamsters, supra.* It is important to note the district court's discussion of the pattern or practice claim:

> "A careful weighing and assessing of the plaintiffs' statistical and non-statistical evidence led the court to conclude that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices, and the analysis proceeded on this assumption. While not conceding that plaintiffs had made a prima facie case, the defendant Extension Service assumed the burden of articulating plausible reasons for its actions, and its evidence, which the court found convincing, has been set forth herein. When the plaintiffs failed to produce evidence to establish that defendant's reasons were pretextual plaintiff's case failed. *EEOC v. Korn Industries, Inc.*, 682 F.2d 256, 262 (4th Cir. 1981). (190a-191a)

It is clear Title VII disparate treatment and 42 U.S.C. 1981 claims both require proof of intentional discrimination. *General Building Contractors v. Pennsylvania, supra.* The district court found there was no intentional discrimination and that the reasons offered by NCAES were valid and plausible and not rebutted. (104a) The existence of intentional discrimination is for the trial court to decide. *Pullman v. Swint, supra.* The district court made no finding that NCAES established or maintained intentionally discriminatory wage scales.

Title VII became applicable to public employers in 1972. *Hazlewood School District v. United States, supra,* decided after *United Airlines v. Evans,* clearly held that a public employer (NCAES) who from that date forward (March, 1972) made all its employment decisions in a wholly non-discriminatory way did not violate Title VII even if it had maintained an all-white work force by purposefully excluding Negroes. Petitioners argument is fraught with misleading statements. Assertions that the majority opinion holds that "North Carolina is free to pay blacks hired prior to 1965 less than whites for the rest of their lives" and to pay blacks based on "racially motivated pay schedues established in the past" are evidence of such distortions. The district court stated:

> "The court has been impressed by the absence in this case of so many of the usual badges of discrimination. For instance there was no evidence—that there is any difference in the entry level salaries of blacks and whites." (199a-200a)

Applying the *Teamsters* and *Burdine* standards of proof, the district court analyzed individual plaintiffs' salary and promotion claims and considered them in determining the pattern or practice case. *Hazelwood* marked the point in time in which analysis of employment decisions by a public employer for purposes of violations of Title VII would start. An analysis by both the district court and the panel majority, as set forth in their opinions, clearly showed NCAE's employment decisions, including administration of salary, to be made in a wholly non-discriminatory way. The lack of proof of intentional wage discrimination coupled with the non-discriminatory salary process supports the decision that NCAES did not violate and was not violating Title VII in 1972 or to the present. Couple this with the findings, not appealed, that there was no discrimination in hiring, promotion, assignments, education opportunities, training or services and it is clear that the plaintiffs' distortion of the facts to attempt to lead the Court to believe that the NCAES salary process involved standardized "wage scales" at any time is specious. *Hazelwood* and *Evans* were properly followed here.

Plaintiff's attack on district court and panel majority's statistical regression analysis rejection is invalid

Petitioners' attack the rejection of their statistical regression in the salary dispute. They claim that the district court "theorized" that there were nine possible explanations other than simply those factors of race, education and job tenure utilized as the basis for their statistical regression. The panel majority agreed that the plaintiffs' statistical proof was "unacceptable". (391a) Petitioners assert the ruling is in conflict with opinions of this Court. NCAES respectfully refers the Court to the factual discussion on salary claims contained in this

Response for a discussion of the "factors" which plaintiffs claim are "theoretical". Petitioners do not take issue with the fact that there was only one area of salary in which the NCAES had any discretion, to wit: Merit pay increases and that across the board, state/county percentages, county merit pay, promotion based pay and so forth were uniformly applied.

Disregarding the facts, Petitioners assert their own interpretation of what data is important. The district court and the panel majority reviewed the entire NCAES salary structure and based upon the evidence, concluded that there were factors of importance not included in plaintiff's statistical evidence which skewed and flawed its effect.

Petitioners erroneously contend that in order to rebut such flawed analysis the defendant *must* offer its own statistics in return. This argument flies directly in the face of the decisions of this Court as discussed in *EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633 (4th Cir. 1983); reversed on other grounds; *Cooper v. Federal Reserve Bank of Richmond, supra.*

In *EEOC v. Federal Reserve Bank of Richmond, supra*, Judge Russell wrote that:

> "Of course, statistical evidence, like any other evidence, is always subject to rebuttal and this rebuttal may assume a number of forms. In *Dothard v. Rawlinson*, Justice Rehnquist, concurring, said that the defendants in a discrimination case may endeavor (in rebuttal) to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in their briefs the probative weight which the plaintiffs' evidence must be accorded. 433 U.S. 338-39 And in *Teamsters*, the Supreme Court declared that statistical evidence may be rebutted by "demonstrating that the plaintiff's proof is either inaccurate or insignificant.' 431 U.S. at 360.

Neither *Dothard v. Rawlinson, supra*, 331; nor *Teamsters v. United States, supra*, require the employer to

defeat plaintiff's proof by statistics alone, but by demonstrating that proof is inaccurate or insignficant. The method is not by statistics alone as petitioners would have the Court believe. The regression which formed the linchpin of the plaintiffs' and United States' joint case omitted proven factors which impact on salary, such as across the board increases, county/state percentage increases, other merit increases, county contributions to salary or the county variances themselves. The district court properly rejected the regression analysis as proof of discrimination because the court understood there existed other relevant factors which had an impact on salaries. The panel majority stated:

> "The district court refused to accept the plaintiff's expert testimony as proof of discrimination by a preponderance of the evidence because the plaintiff's expert had not included a number of variable factors the court considered relevant, among them being the across the board and percentage pay increases which varied from county to county. It defies logic to compare the salary of an agent in a county which has granted many or large increases or pays high salaries with one in a county which has granted few or small increases or pays lower salaries . . . .
>
> Most of plaintiffs' salary case is built upon the multiple regression analysis of their expert and we think that the district court was not required to accept that testimony as proof by a preponderance of the evidence . . . . (387a-388a)

The facts clearly prove that each NCAES professional employee in 100 different counties is subject to different factors that impact on his or her salary level and have nothing to do with race.

NCAES produced countervailing and convincing evidence to show petitioners' statistical case as inaccurate and insufficient. *Teamsters, supra,* permits this to be done by substantive evidence not simply by counter statistics. The panel opinion is not in conflict with *Teamsters* or the other decisions cited by petitioners.

II. THE COUNTY EXTENSION CHAIRMEN CLAIMS WERE CORRECTLY DECIDED AND THE DECISION DOES NOT EXTEND *GENERAL BUILDING CONTRACTORS v. PENNSYLVANIA*, 458 U.S. 375 (1982) NOR VIOLATE *ARIZONA GOVERNING COMMITTEE v. NORRIS*, 77 L.Ed. 2d 1236 (1983)

Petitioners assert that the district court and Panel decision was incorrect in connection with the claims surrounding the position of County Extension Chairman. This part of the decision was not dissented from by Judge Phillips. At the outset, it should be noted that the petitioners attack the decision on a narrow ground asserting that the panel failed to recognize the NCAES responsibility and liability for final selection of county extension chairmen. That is not the case at all.

Petitioners assert that the decision extends the holding in *General Building Contractors* to Title VII,

> "despite the fact that Title VII, unlike section 1981, contains no such intent requirement." (Pet. p. 50)

This assertion is simply incorrect. Title VII disparate treatment cases require proof of discriminatory intent on the part of the employer. *Teamsters, supra, McDonnell-Douglas, supra, Pullman Standard v. Swint, supra.*

The Petitioners had to prove intentional discrimination in connection with the county extension chairmanship claims. This they failed to do. The district court analyzed the individual claims of those plaintiffs who believed they had been discriminated against in connection with selection for county extension chairman. The district court utilized the allocation of proof set out in *Texas Department of Community Affairs v. Burdine*, a Title VII disparate treatment case, in analyzing every individual claim for intentional discrimination. (222a-227a) In its analysis of each claim, the district court found no intentional discrimination. This further buttresses the determination that there was no pattern or practice of discrimination, as both claims require intentional discrimination. *Teamsters, supra.* (203a-345a)

Nor is this case similar to *Norris*. NCAES did not delegate its employment decisions to the Board of County Commissioners. The record is completely clear that *both* NCAES and the County Commissioners employ the county level employees, including CEC. (23a-24a)

It is the responsibility of NCAES to recommend qualified CEC candidates. The Board may either accept or reject the recommendations of NCAES. This is not delegation of authority. (23a-24a).

Second, the plaintiffs and the United States to utilize "discrimination" to describe the hiring decisions made in connection with the County Extension Chairman. They overlook the fact that the district court examined each individual CEC applicant's claim and found no discrimination in any of the decisions. (227a-319a) Petitioners' assertions that "the record in this case made clear that county officials invariably exercised any such delegated authority in a racial manner" are specious and without merit.

Third, the petitioners purported statistical case involving county chairman was analyzed by the district court and panel and found to be inadequate to support a finding of discrimination. The district court stated:

> "Plaintiff's statistics are flawed in a further respect in that they include the assumption that every black full agent at the county level was qualified to fill the position of county chairman. There was an utter lack of any proof to substantiate such a claim, and the persistent efforts of defendants through discovery and all the way through trial to require plaintiffs to identify the qualified labor pool from which this position should be filled met with no success. While it is true that most vacancies have been filled from within the ranks of county professionals, it is equally true that the position of county chairman requires special administrative leadership skills not shared generally by all employees." (87a-89a)

The fourth point is that despite the different analysis of the statistical evidence of comparing applications and

recommendations, by the panel and the district court, such analysis did not probe any deeper than race, application and recommendation. The analysis was insufficient to give rise to a prima facie case and considering all of the evidence presented, was found to be unpersuasive. (100a) The panel stated:

> "If we assume that a prima facie case was made by the naked statistics consisting of vacancies and successful applicant from 1968 through 1981, it has been completely refuted by consideration of all of the applications and even if the burden was upon the Extension Service to prove that its employment decisions were free from racial discrimination it has done so." (423a)

Petitioners and the United States were permitted at trial to put on rebuttal evidence to refute or show pretext in any explanations provided by the defense. This they failed to do.

III. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH *GREEN v. SCHOOL BOARD OF NEW KENT COUNTY*, 391 U.S. 430 (1968)

NCAES, as do all other Extension Services, sponsors two voluntary participation community programs, 4-H and Extension Homemaker Clubs. Petitioners assert that the district court and panel majority incorrectly denied petitioners' claims with respect to an alleged affirmative duty on the part of NCAES to force integrated membership in local Extension Homemaker Clubs and 4-H Clubs existing in racially mixed communities. Petitioners compare this to is a school case and utilize the catch phrase of "freedom of choice" plan to fit these voluntary programs into *Green v. School Board of New Kent County*, *supra*, and to divert attention from the facts. It is significant that the United States pursued this claim at trial but did not appeal this issue. Here is what the record shows.

Extension Homemaker Clubs

Extension Homemaker Clubs are voluntary, volunteer groups formed in communities by adults and receive home economic and other advice and support from NCAES. It has been the policy that all extension homemaker clubs are to be organized without regard to race and for each club to certify that its membership will be open to all persons without regard to race. NCAES home economics agents are instructed to encourage the formation of new clubs within their respective communities without regard to race. Announcements of club formation and this policy are published in the media. Despite this, clubs of one race exist and so do many clubs of both races. (165a)

There has been no evidence presented that since the adoption of this policy for extension homemaker clubs that *one* single black or white person has sought and been denied membership on the basis of race in an extension homemaker club in North Carolina. (166a-172a)

NCAES has created an integrated environment and the district court found:

> "the evidence shows, and plaintiffs do not question that for all phases of club activity above the community club level, all extension staff and volunteer leaders, all county wide, district and state meeting and training sessions are fully integrated." (168a-169a; FN 53)

4-H and Youth Program. The 4-H and Youth Program conducted by NCAES is designed to develop good citizenship, character and to teach youth useful and practical skills. North Carolina ranks 7th in the United States in terms of black youth participation in 4-H. (Tr. 5107). 4-H is a voluntary program not a mandatory public school system. It is significant that in 1972 black youth participation in 4-H programs was 22,174. From 1972 to 1980 participation by black youth rose to 30,243. while black volunteer leadership increased from 2,665 in 1972 to 4,022 in 1980. (DX 227) Membership

in 4-H is not static. It is open to youth 9 to 19 and membership is constantly changing. About 1/3 of the units are reorganized each year and consequently, the clubs are not static. A 9 year old in 1965 would be in his or her early 20's now. (Tr. 5107) Out of the 30,243 black youths and 4,022 black volunteer leaders who voluntarily participated in 4-H in 1980, or any other of the thousands of persons, black or white, who participated in 4-H from 1965 to time of trial, none came forward to testify that he or she had been discriminated against in connection with the 4-H program.

Except for the one incident in Wake County involving a 4-H youth and volunteer leader, there has been no evidence presented of any person, black or white, being excluded from, denied participation in or subjected to discrimination with respect to participation in the community club 4-H program in North Carolina. (167a) The evidence presented in this case is that NCAES's 4-H and youth program is completely integrated in all activities beyond the community 4-H club level and has been for many years. (168a-169a).

The 4-H program has grown to 34,000 black participants in 1980 and black participation in 4-H has risen and not declined. This is conclusive proof that blacks participating in the 4-H programs in North Carolina do not consider their membership in the 4-H clubs "a badge of slavery" as petitioners previously argued.

Petitioners assert that NCAES failed to follow administrative "affirmative action" regulations of the U.S.D.A. interpreting Title VI. At trial Petitioners took the position that affirmative action required all clubs of one race in a mixed community to merge with clubs of another race and if not the Extension Service would be required to withdraw services and support. In short, to shut off the program. (166a-167a)

The district court found that the 4-H and extension homemaker programs met the requirements of Title VI

and were operated without discriminatory intent or purpose. (170a-183a).

The district court also recognized that this was not the same situation as "freedom of choice" school cases such as *Green* and that this is not a "freedom of choice" case. (174a) Petitioners' assertions to the contrary should be disregarded.

The fact that not one black parent, leader or child came forward to testify that he or she had ever been denied membership, subjected to unfair or unequal treatment or subjected to racial discrimination in the 4-H program in North Carolina is overwhelming proof that NCAES has taken affirmative action with respect to 4-H in North Carolina. The district court and panel majority's decisions are correct.

IV. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH *EISEN v. CARLISLE & JACQUELIN*, 417 U.S. 156 (1974)

Petitioners' contend that the decision of the court of appeals is in conflict with *Eisen v. Carlisle & Jacquelin*, *supra*. Petitioners assert that this Court, in *Eisen* determined that the propriety of a class action does not rest on whether or not the plaintiff will prevail but rather whether or not the requirements of Rule 23 are met and that the district court and court of appeals failed to follow that directive in this case. *Eisen* involved two issues. The first was whether or not the determination of a class certification and requirements that defendants pay a part of the statutory notice requirement were appealable as a "final order" under 28 U.S.C. 1291 and the second was whether the district court's order directing the defendants to pay part of the cost of notice after a preliminary hearing on the merits was in violation of Rule 23. This Court held that the orders were appealable within 28 U.S.C. § 1291 and that the order requiring the defendant to pay the cost of notice after preliminary inquiry into the merits was error. *Eisen, supra*, 178.

It is important to note that class action certification was denied by the district court in 1979, following completion of discovery and that both petitioners and the United States had filed motions for class certification. The case proceeded as a pattern or practice action on behalf of the same persons seeking to be certified as a class and seeking the same relief. The district court properly determined the class issues by following the requirements of Rule 23. (33a-49a)

The petitioners continue to press issue of the denial by the district court of class certification for 3 purported classes: (1) All black employees of NCAES on or about November 18, 1971; (2) All black members and potential members of NCAES 4-H and Extension Homemaker Clubs on or after November 18, 1971; and (3) A defendant class of all county commissioners within the State of North Carolina on or after November 18, 1971. It is hard to imagine why this issue continues to be brought forward in view of the fact that this action was tried in common cause and on a theory of pattern or practice on all issues. The petitioners' Post Trial Submittal of Proposed Findings of Fact and Conclusions of Law, incorporated the suggested relief contained in the United States Post Trial Submittals. The relief consisted of a proposed decree and order granting all the relief plaintiffs wanted if they won. (Plaintiffs Memorandum and Proposed Conclusions of Law and Fact filed February 8, 1982)

NCAES respectfully directs the Court's attention to the district court's decision and the salary claim discussions contained in this Response for a statement of the facts as to why the employee class was correctly not certified. NCAES professional county personnel are not situated in like employment situations "across the board" be they black or white. Each county agent within NCAES is employed to fill a vacancy within a particular county and to fill the special requirements and need of that county. Each county's contribution in salary percentage

and salary offered differ from other counties. The claims of one plaintiff against a county for salary will not be typical with those of another. Likewise, the actions of each of the 100 Boards of County Commissioners with respect to hiring, selection of county chairmen and salary are autonomous within themselves. In short, the black plaintiffs are scattered over the state, each holding different jobs and performing different responsibilities within particular counties within 30 or so of the 100 separate counties. In no sense are they workers within the same facility or do they have commonality with blacks employed in other counties. The only commonality is race and that factor, is insufficient for class certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

Likewise, the decision to deny class certification to the alleged class of County Commissioners is correct. Each of the 100 Boards of County Commissioners is autonomous. Each makes decisions only with respect to NCAES employees which it agrees to employ. Black professionals are not employed in all 100 counties. The actions of one Board of Commissioners are not binding on another. Class certification for the Boards of County Commissioners within North Carolina's 100 counties was appropriately denied. *See Paxman v. Campbell*, 612 F.2d 848 (en banc) (4th Cir. 1980) holding class certification of 130 Virginia school boards inappropriate. There was no evidence of intentional discrimination or a statewide course of action by any or all of 100 Boards of County Commissioners with respect to the petitioners. Each Board maintained complete autonomy over its employment decisions. Class certification was properly denied.

The district court did not refuse to certify classes by virtue of conducting a preliminary inquiry on the merits as prohibited by *Eisen*. Petitioners try to distort the district court's refusal to certify a class of black 4-H and Extension Homemakers so as to make it appear the district court refused upon some preliminary showing on

the merits rather than by applying the test of Rule 23. Nothing could be farther from the facts. The district court refused to certify the class before trial and again after trial on the merits. The panel majority stated:

> "The court found that there was no evidence whatever that any other black child was ever denied membership in a 4-H Club or denied 4-H Club services, or provided inferior services by the Extension Service. It thus denied certification of the class. *The plaintiffs do not take exception either to the findings of fact of the district court or to its conclusion that the class should not have been certified on the basis relied upon by that court.*" 370a-371a (emphasis added).

Suffice it to say that Petitioners failed to produce a single alleged class member to testify. Since there was no evidence of discrimination in the first instance, class certification was appropriately denied as no class ever existed.

The United States and petitioners tried this case hand in glove and proceeded in common cause. The relief sought by pattern or practice claims was as broad as any class claims and permissible without regard to the requirements of meeting Rule 23. The pattern or practice claims provided the individual plaintiffs and prospective class members with an avenue of relief without regard to Rule 23. *General Telephone Company v. EEOC, supra*, provides that pattern or practice relief would be the same as if class certification occurred. *Cooper v. Federal Reserve Bank of Richmond*, held that the elements of a prima facie pattern or practice case are the same in a private class action. Petitioners have yet to point out a single prejudice or disadvantage to them at trial by not receiving class certification. Had they won they would have been entitled to the same relief.

It is clear that Rule 23 was properly applied and *Eisen* was not disregarded by either court. 365a-378a.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted, this 16th day of August, 1985.

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APPENDIX

EXHIBIT A

VARIATIONS IN SALARIES OF COUNTY EXTENSION AGENTS BETWEEN JULY 1, 1979 AND JULY 1, 1980

	Source and Amount of Salary 7/1/79				Source and Amount of Salary 7/1/80		
Name of Agent	County	State	County	Total	State	County	Total
Pam Bagwell	Macon	8,237	3,763	12,000	9,061	3,993	13,059
Wallace Stephens	Bladen	6,000	6,000	12,000	6,600	6,480	13,080
Fletcher Barber, Jr.	Chatham	7,788	4,212	12,000	9,767	4,507	14,274
Bobby Edwards	Alleghany	8,600	3,900	12,500	10,060	4,095	14,155
Anne Edge	Hyde	9,651	2,892	12,543	12,116	3,448	15,564
Gerda DeJong	Washington	9,863	2,764	12,627	11,549	2,985	14,534
Sylvia Siler	Beaufort	8,593	4,044	12,637	10,352	4,452	14,804
Doug Lee	Davie	8,557	4,120	12,677	10,213	4,500	14,713
Jessica Tice	Currituck	9,569	3,180	12,749	11,826	3,502	15,329
Lee Matthews	Bladen	8,830	4,070	12,900	10,213	4,396	14,609
David Goff	Cabarrus	7,412	5,998	13,410	9,053	6,469	15,552
Theresa Ford	Chowan	9,189	4,485	13,674	11,558	4,889	16,447
John Deweese	Hyde	10,369	3,425	13,794	13,146	3,728	16,874
Robert Lopp	Davidson	7,335	7,116	14,451	8,969	8,316	17,285
James Williams	Caswell	9,978	4,522	14,500	11,476	4,894	16,360
Wanda Wilkins	Greene	9,591	4,988	14,579	11,150	5,680	16,830
Connie Greene	Avery	10,519	4,376	14,895	12,711	4,814	17,525
Jerry Simpson	Cabarrus	8,291	6,709	15,000	9,120	7,380	16,500
Jerry Washington	Alleghany	11,761	3,314	15,075	14,077	3,480	17,557
Pat Sheppard	Pasquotank	11,004	4,215	15,219	12,104	4,635	16,739
Ronnie Thompson	Davie	10,413	5,100	15,513	13,015	5,640	18,655
Nancy Hartman	Davie	10,551	5,061	15,612	12,606	5,520	18,126
Lynn Qualls	Randolph	9,363	6,343	15,706	11,690	6,827	18,517
Rebecca Beets	Watauga	10,848	5,152	16,000	13,133	5,736	18,869
William Ruark	Forsyth	8,000	8,070	16,070	8,800	8,881	17,681
Robert Breland	Ashe	13,522	2,736	16,258	15,274	2,964	18,238
Jo Ann Falls	Forsyth	9,240	7,030	16,270	10,764	8,881	19,645
George Koonce	Warren	12,098	4,368	16,466	14,308	4,718	19,026
Sandra Brown	McDowell	9,722	6,770	16,492	11,094	7,312	18,406
Franklin Shaw	Onslow	10,573	5,927	16,500	12,030	6,372	18,402
Ostine West	Davie	11,468	5,522	16,990	13,615	6,024	19,639
R.D. Hodges	Henderson	11,519	6,552	18,071	12,671	7,076	19,747
Jean Rawls	Bladen	11,809	6,297	18,106	12,500	8,787	21,287
Earline Walker	Wake	9,572	8,544	18,116	11,329	10,818	22,141
Earline Waddell	Richmond	13,061	5,112	18,173	15,607	5,623	21,230
Nancy Lilly	Onslow	11,657	6,534	18,191	13,623	7,020	20,643
Jean Hubbard	Moore	10,429	7,827	18,256	12,472	8,375	20,847
William Fowler	Wilkes	11,125	7,284	18,409	12,678	8,280	20,958
Pam Outen	Cabarrus	10,193	8,250	18,443	11,912	9,075	20,987
Virginia Credle	Beaufort	13,381	5,076	18,457	15,919	5,580	21,499
Rebecca Gaddy	Stanley	11,104	7,690	18,794	13,214	8,267	21,481
Ken Patterson	Alexander	11,971	6,864	18,835	13,868	7,344	21,212
Doris Rogers	Cabarrus	10,914	8,832	19,746	13,005	9,165	22,170
Tommy Glover	Sampson	12,881	7,008	19,889	16,009	7,536	23,545
C.D. Bunn	Swain	13,672	6,367	20,039	15,040	6,367	21,407
Doug Young	Randolph	12,348	7,741	20,089	14,183	8,515	22,698
Jane Ross	Bladen	14,556	5,603	20,159	16,876	7,009	23,885
Sara Casper	Wake	10,890	9,324	20,214	13,179	11,376	24,555
Robert Swain	Duplin	13,476	6,846	20,322	15,524	7,325	22,849
Ozetta Guye	Alamance	11,804	8,725	20,529	14,284	9,597	23,881
Dorothy Greene	Guilford	11,923	8,784	20,707	13,815	9,624	23,439
Sam Tuten	Forsyth	9,618	11,295	20,913	11,180	12,417	23,597
Carol Baker	Union	13,516	7,826	21,342	15,868	9,048	24,916
Phil Bazemore	Union	13,857	7,748	21,605	16,243	8,580	24,823
John Waddell	Surry	11,519	9,808	21,327	13,911	10,655	24,566
Eugenia Ware	Rutherford	12,683	9,296	21,979	15,766	9,761	24,812
F.G. Johnson	Pasquotank	16,052	6,146	22,198	18,857	6,760	25,617

Source of Data: U.S. Exh. #58

Supreme Court, U.S.
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No. 85-93

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES

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QUESTION PRESENTED

1. Should this Court grant *certiorari* to review the fourth circuit's decision that there was no pattern or practice of intentional discrimination in the salary claims of Petitioners when the salary claims were correctly decided and no pattern or practice of intentional discrimination was found by the district court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT:	
The Salary Claims Were Correctly Decided and Certiorari Should Not Be Granted to Review Them	8
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Dothard v. Rawlinson, 433 U.S. 312 (1977) 7
EEOC v. Korn Industries, Inc., 682 F.2d 256 (4th Cir. 1981) 18
General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982) 18
Hazelwood School District v. United States, 433 U.S. 299 (1977) 6, 10, 18, 19
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 6, 7, 17
McDonnell-Douglas v. Green, 411 U.S. 792 (1973) .. 5, 6, 17
Pullman Standard v. Swint, 456 U.S. 273 (1982) .. 6, 18
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 19
United Airlines v. Evans, 431 U.S. 533 (1977) 6, 18, 19

Constitution, Statutes and Regulations:

42 U.S.C. § 1981 5
42 U.S.C. § 2000d 1
42 U.S.C. § 2000h-2 1
42 U.S.C. § 2000d-1 1
42 U.S.C. § 2000e, *et seq.* 2

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION OF THE UNITED STATES

STATEMENT OF THE CASE

This action was instituted in the U.S. District Court for the Eastern District of North Carolina on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (NCAES) alleging racial discrimination in employment and the provision of services by NCAES on behalf of 5 purported classes of blacks and indians. The United States intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1.

The United States was permitted to amend its complaint in intervention by Order of the Court on October 9, 1979, to include allegations of a pattern and practice of racial discrimination in alleged violation of Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Class action certification was denied by the Court on October 9, 1979, after discovery closed.

On November 23, 1981, plaintiffs, amended their complaint to allege violations of Title VII. The defendants denied all allegations of discrimination. The nonbifurcated trial of this action began on December 7, 1981, and ended on February 12, 1982. Counsel for the United States and plaintiffs, acknowledged this was a disparate treatment case and that they had the burden of proving a policy, pattern and practice of intentional discrimination. (Tr. 10, 13, 16). The plaintiffs and the United States called over 46 witnesses to testify and introduced a multitude of exhibits in support of their pattern and practice and individual claims.

The defendants' case began on December 31, 1981 and the defendants called over 15 witnesses and introduced over 250 exhibits in support of their contention that no pattern or practice of discrimination existed and that the individual plaintiffs were not entitled to relief.

Both the United States and the private plaintiffs called rebuttal witnesses. (Tr. 6411-6616). The transcript consisted of 32 volumes and 6818 pages. Although there was some overlap of exhibits, the defendants introduced 274 exhibits, the plaintiffs 262 and the United States 274.

On August 20, 1982 and September 17, 1982, the Court entered Judgments and Orders dismissing all claims of both the United States and the individual plaintiffs.

In its decision of August 20, 1982, with respect to the pattern and practice claims, the Court found as follows:

(a) That this was not a proper action to be certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. (49a) This Finding was appealed.

(b) That blacks are not discriminated against in geographical employment assignments in NCAES. (53a) This Finding was not appealed.

(c) That NCAES does not discriminate in recruitment of black professional employees (55a) This Finding was not appealed.

(d) That NCAES does not discriminate in hiring black professionals at the county and state levels and NCAES's selection procedures are non-discriminatory. (62a) This Findings was not appealed.

(e) That NCAES does not discriminate in assignments of professional personnel to areas of responsibility (i.e. crops, livestock). (64a). This Finding was not appealed.

(f) That NCAES does not discriminate in title promotions of county level professional employees (from assistant to associate to full agent) and the performance evaluation system used in connection with promotions of county level professionals was valid, and non-discriminatory. (74a) This Finding was not appealed.

(g) That NCAES does not discriminate in the selection of county extension chairmen. (101a) This Finding was appealed.

(h) That NCAES does not discriminate in the selection of state level positions such as director, program leaders, specialists, and district chairmen. (106a) This Finding was not appealed.

(i) That NCAES does not discriminate with respect to terms, conditions and privileges of employment. (72a) This Finding was not appealed.

(j) That NCAES does not discriminate in connection with salaries. (150a) This Finding was appealed.

(k) That NCAES does not discriminate in work assignments. (152a). This Finding was not appealed.

(l) That NCAES has established valid, nondiscriminatory qualifications, tests, selection standards and procedures in hiring and promotion. (158a) This Finding was not appealed.

(m) That NCAES has taken appropriate action to correct the present effects of past racially discriminatory policies and practices. (163a). This Finding was not appealed.

(n) That NCAES provides equal services to minorities (164a). This Finding was not appealed.

(o) That NCAES' services to farmers and other persons are provided on non-racially segregated basis. (164a). This Finding was not appealed.

(p) That NCAES is not in violation of Title VI in the delivery of services to 4-H and Extension Homemaker Clubs. (185a). This Finding was appealed by Petitioners but not by the United States.

(q) That the case was a disparate treatment case, and NCAES did not engage in a pattern or practice of racial discrimination. (205a)

In its decision of September 17, 1982, the Court analyzed the individual claims of 42 plaintiffs and determined that none were entitled to relief.

The United States and private plaintiffs appealed to the fourth circuit. The United States appealed from only *3* of the 16 adverse rulings on their claims of alleged pattern or practice of discrimination. The private plaintiffs appealed from only *4* of the foregoing adverse rulings.

Decision was rendered by the court of appeals on December 10, 1984, affirming the district court's two judgments in all respects. Judge Phillips dissented on three claims, to wit: the 4-H Club claims; class action and sal-

aries. He affirmed in all other respects. Petitions for Rehearing and rehearing *en banc* were denied by an evenly divided court on April 15, 1985.

On July 15, 1985, the private plaintiffs petitioned this Court for Writ of Certiorari to review the denial of the salary, county extension chairmen, 4H and Home Economics Clubs, and class action claims. NCAES filed a Brief in Opposition to private plaintiffs' petition, which Brief is referred to in respect to NCAES' position and grounds for opposition of all issues for which review is sought by private plaintiffs.

The United States obtained permission to extend its time in which to file a petition and response to private plaintiffs' petition until September 16, 1985. On September 16, 1985, the United States filed a Petition for Writ of Certiorari and Response to private plaintiffs' petition.

The United States sought review of only one issue related to the salary claims and responded to the other questions raised by private plaintiffs by stating it did not believe the remaining questions merit review by this Court. The one issue which the United States argues that this Court should review has been conceded by the United States to be a "rather narrow one." NCAES opposes the Petition for Writ of Certiorari filed by the United States.

SUMMARY OF ARGUMENT

The court of appeals correctly decided the salary claims in this disparate treatment case. The district court properly analyzed the salary claims by the allocation of proof set for pattern or practice and individual claims of racial discrimination through disparate treatment, which claims require proof of intentional discrimination, be they Title VII or 42 U.S.C. § 1981. The district court and court of appeals correctly followed *McDonnell-Doug-*

las v. Green, 411 U.S. 792 (1973); *Teamsters v. United States*, 431 U.S. 234 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977) in requiring petitioners to prove their assertions of intentional discrimination. In each instance, petitioners failed to do so. The existence of intentional discrimination is for the trial court to decide. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's two decisions clearly show this was carefully decided on the facts and the facts showed no discriminatory intent.

The petitioner United States has elected to attempt to obtain review of an issue which it concedes is a rather narrow one and of diminishing importance. That issue is also one which the petitioners have created based upon an incorrect view of the facts and the decisions of the district court and the court of appeals. Petitioners claim that the decision permits the continued existence of discriminatory pre-1965 wage scales to justify post Act payment of lower salaries to blacks than similar situated white NCAES employees. This is incorrect and disregards the facts in this case.

Petitioners seek review by avoiding the facts and utilizing misdirected and specious assertions. Knowledge of the particular facts surrounding NCAES, its special requirements for hiring, staffing and the real non-discriminatory factors which clearly affect salary differences between all agents regardless of race is essential. NCAES employees, black or white, are not similarly situated.

Extension service employees in each of the 100 counties of North Carolina have factors affecting salary that are different from county to county and have nothing to do with race. Petitioners come here asserting the same old arguments which have failed them in the past. There are no "wage scales" involved and petitioners failed to

prove intentional discrimination in both pattern or practice and individual salary claims.

NCAES employees are professionals with college degrees required. Each of 100 counties has needs for different training and educational skills for NCAES agents and each county contributes different percentages of each agent's salary and percentages vary annually. NCAES pays the remaining percentage of an agent's salary. Salaries are not now, nor have they ever been, the same except for the minimum starting salary. From initial employment on, salaries of agents vary from county to county depending on performance, percentage of state versus county contribution and many other factors, none of which are racial.

The United States and private petitioners tried this case without regard to the facts surrounding the NCAES and are here trying once again to catch the Court's eye with an issue bearing no factual relationship to the NCAES salary and operational structure. This case is a disparate treatment case and petitioners failed to prove intentional discrimination.

At trial, petitioners submitted inaccurate comparisons and statistics which failed to utilize the proper factors affecting all agents' salaries. NCAES refuted and rebutted such evidence and showed it to be inaccurate and lacking in probative weight, which is permissible under standards set by this Court in *Dothard v. Rawlinson*, 433 U.S. 331 (1977) and *Teamsters, supra*. The district court and court of appeals properly rejected such evidence and improper statistics. Petitioners have nothing new or important to bring before this Court in connection with the salary claims or any other self-styled issue.

NCAES met the claims of petitioners and the United States head on in the trial of this case, responded to each claim, and showed an organization free from racial discrimination. Certiorari should be denied.

ARGUMENT

THE SALARY CLAIMS WERE CORRECTLY DECIDED AND CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THEM.

The Intentionally Discriminatory "wage scale" argument is specious

Petitioners argue that the decision holds that Title VII permits an employer to continue to pay similarly situated blacks less than similarly situated whites pursuant to intentionally discriminatory "wage scales" established prior to 1965 and that alleged resulting disparities constitute continuing violations of Title VII in conflict with other decisions of the fourth circuit. The opinion does not hold that at all and there is no evidence that NCAES ever established "intentionally discriminatory wage scales" prior to 1965 or at any other time. NCAES agents, whether black or white are not similarly situated.

Petitioners have made blatant assertions as to what the district court and fourth circuit held without providing the Court with the facts surrounding NCAES, its organization, structure, salary process and promotion practices. Knowledge of the NCAES, its organization, structure and salary process is essential to an analysis here. The district court's opinion is respectfully referred to for a detailed summary of NCAES, its function, salary process, programs, and employment processes. (6a-207a)

It is essential to understand from the outset that NCAES is not a factory assembly line endeavor, nor a corporation whose work force engages in similar tasks in similar work environments at plants and offices located within each of North Carolina's 100 Counties. Petitioners refer to the NCAES salary process as "wage scales" as if this case were a plant setting. Such is not the case.

The district court and the panel majority recognized that no "wage scale" situation exists and no meaningful

conclusions as to salaries can be drawn by petitioners comparing agents' salaries by title, race and tenure across county lines. Both courts correctly understood that such a comparison led to no valid conclusions at all under the facts of this case. North Carolina is divided geographically into 100 counties. Each county is a separate governmental agency with its own elected Board of Commissioners. NCAES and each county enter into a "Memorandum of Understanding" which is a separate written agreement and which, *inter alia*, governs the hiring of NCAES professional employees within the county and the amount of financial support that particular county will contribute towards the NCAES professional employees' salaries on a percentage basis. NCAES county level professional employees, i.e., agents, receive two checks each month. One is from the NCAES, funded by state and federal funds, and the other from the County. NCAES agents cannot be hired to fill a county agent position without County approval. The salary claims of petitioners focus on county level employees of NCAES. (20a-24a).

The specific needs of each of North Carolina's 100 counties determine the educational background and skills needed in the agents it employs. The minimum educational requirement is a bachelor's degree and skills within subject matter areas such as are needed by a particular county's extension program, to wit: Agriculture, 4-H, Home Economics or CRD. For instance, if a particular county has a large dairy farm population, its agricultural program needs would require an agent with a dairy or animal husbandry educational background or training skills. Thus each county has special needs. (58a-60a)

Why is this so? The answer is simple. North Carolina counties vary greatly in population, rural/urban population, size, racial makeup, topography, agrarian needs and resources. The climate and adaptability of the land

for crops, trees, poultry and livestock vary tremendously between counties located within the coastal plain, piedmont and mountain regions of the State. Black agents prior to the 1965 merger only functioned in 51 out of 100 counties and there are counties which have never had black extension agents due to the fact that few blacks reside there and blacks did not apply for extension positions there. (28a-29a, 48a, 192a-193a) No discrimination was found in NCAES assignment, recruitment or promotion of black NCAES employees.

Thus, the qualifications (educational background and skills) of the individual agents required to serve the needs of each county must differ and are in fact different as the record here reveals. (58a-59a) It is undisputed in this case that because of the wide variance among North Carolina's counties, the requirements for extension staff vary greatly from county to county and the needs of a particular county dictate the areas of subject matter responsibility, i.e., livestock, soybeans, etc., extension agents must possess within the particular county. Once an agent is hired to fill a county level professional position, he or she cannot be required to move or transfer by NCAES from one county to the other nor fill a position opening for which that agent is not qualified by education, training or interest to fill. (59a-61a) Each position carries its own special needs depending on the needs of the particular county. Where special qualifications are required to fill particular jobs, comparisons to groups who do not possess such special qualifications are of little probative value. *Hazelwood School District v. United States*, *supra*, 307-308. Just as the varying needs of each county governs its NCAES professional staff, the variance between each 100 counties in size, population, agriculture and wealth, governs each county's particular ability to financially support its Extension program within the county, including contributions to county agents' salaries. This has always been the case.

Because of this fact, some counties have an ability to pay more of an agent's salary than other out of their own funds and to pay their agents higher salaries. The remainder of each agent's salary comes from state and federal funds. The federal government allocates a sum of money to NCAES each fiscal year. Federal funds are combined with funds from the North Carolina general Assembly for NCAES to support salaries for county extension employees. The NCAES in consultation with the Board of County Commissioners determines what the state share of the agent's salary will be from the federal and state funds and what the county will pay that agent as its contribution. (20a) The percentage of salary paid by the county and NCAES varies greatly from county to county. These percentages change each year depending on the county's individual ability to pay and interest in the NCAES program within the county. In 1981 the percentage of salaries of local extension staffs that were paid by county funds ranged from a high of 57% in Forsyth County to a low of 18% in Camden County. (110a-113a).

Each county's extension staff is not staffed at the level of others. Each county staff is headed by the County Extension Chairman ("CEC") who is the highest paid NCAES county staff member in the county. The salary received by CEC's varied greatly between counties depending on the county's support. (DX 67-1-67-100) The minimum county staff is 2 and several counties have staffs exceeding ten agents in number. The agent determines whether or not to apply for each vacancy and applicants who do not have the skills and educational background required for the county vacancy are not considered. The district court found that the recruitment and hiring practices of the NCAES were valid and non-discriminatory. (58a-62a)

NCAES sets a minimum salary level for all new employees at the Assistant Agent Level with a bachelor's

degree and no prior experience. A salary differential is offered to those holding master's degrees. On occasions, due to "market demand" an agent has been employed above the entry level in order to obtain the skills in short supply. There have also been times when prior and relevant experiences justified a salary above minimum entry level. (109a) Since 1965, NCAES has set the minimum starting salary for all new county agents uniformly. (383a)

After initial employment, the agent or a County Chairman's salary may be affected at any given time by a great number of factors such as tenure, additional degress, subject matter area of specialty, area of responsibility, job performance and promotion from assistant agent to associate agent to full agent, ability of county to pay, state and county across the board raises, state and county merit increases, market competition for holders of certain educational degrees, and competition between counties for a certain agent's skills. (109a-116a, 133a-136a, 383a-385a) Contrary to petitioner's assertions, these variable factors are real, not imaginary and are supported by the record. (362a)

The position of County Extension Chairman was established in 1962 prior to the enactment of Title VI. (82a-83a) The County Extension Chairman is the top administrative position in each county. (74a, 82a) Petitioners tried to lump CEC salaries in their statistical salary comparisons of other agent's salaries. (136a-138a)

The panel majority noted the difference of the County Extension Chairman in salary and stated:

> "The district court correctly declined to compare or include the salaries of County Chairmen with those of agents. There is about a $4,000.00 average salary difference between chairmen and agent to begin with. The chairman is the head of the county based employees of the Extension Service. He is not

> routinely promoted from agent; the method of his selection is entirely different, and counting the salaries of the County Chairman together with those of the agents for purposes of analysis could only distort the result. (382a-383a)

The salary paid the chairman sets the *maximum extension salary* pay of any agent for that county. (DX 67-1-67-100, A. 632-633, 2210) Regardless of the starting salary, level, skill, performance or tenure, an agent's maximum will be *capped* by the salary paid to the chairman. There was one exception found in 1981, in Alamance County, where the salary of Ozetta Guye, a black HEA, exceeded that of the Chairman. (DX 67-86) As between County chairmen the salary ranges have always varied thereby directly impacting on the maximum amount of the agents' salaries within the counties. This accounts for differences among county agents' salaries and has nothing to do with race. Petitioners attempt to direct attention from this. The reason why can be plainly seen from the following facts.

In 1971, chairmen's salaries ranged from lows of $11,601 (Dare) and $11,621 (Avery) to highs of $16,588 (Wake) and $16,646 (Rockingham). In 1976 the range was from low of $16,028 (Dare) to high of $23,931 (Wayne). In 1981, CEC salaries ranged from lows of $20,000 (Stokes, Clay) to highs of $34,577 (Sampson) and $34,588 (Lenoir). (DX-196) As no one under the chairman receives a higher salary on the county level, this is proof positive that salaries vary from county to county because of this factor.

App. Exhibit A is a copy of DX-196. This Exhibit shows the percentages of county contribution to the NCAES program for all 100 counties in 1971/72 together with the salaries of all 100 CEC's for the years 1971, 1976 and 1981. This clearly shows the variances in salaries between counties. As the CEC's salary is the cap, the variances of salaries between agents from one

county to the next vary as well. It further proves there are no uniform wage scales and NCAES agents are not similarly situated.

The salary process is non-discriminatory

The salary process of NCAES conducted annually involves pay raises of only three kinds. The panel majority grasped this fact and stated:

> "At the outset of this part of the discussion, certain matters admitted or found by the district court and not appealed are important to remember. There is no discrimination in hiring. There has been no discrimination in promotion from assistant to associate to full agent. Pay raises of three kinds from whatever source, percentage raises, across the board raises, and merit raises. There is no discrimination in across the board and percentage raises. Everyone gets them . . . ." (Id. p. 25, 26) The merit salary process was determined to be nondiscriminatory. (383a)

Another factor which explains differences in salaries is that the percentage of total salary paid by each county varies from county to county. Percentages ranged from 18% to 57% in 1981. This factor alone causes differences from entry level on with respect to across the board and percentage raises, from state/federal and county funds, regardless of source and from year to year. Race has nothing to do with percentage contributions. (383a)

For example. Two agents both started at $15,000.00 entry level in 1981, and both agents were employed as agricultural agents with agronomy backgrounds. Each was employed to fill a vacancy in a different county. In 1982, the State of North Carolina provided a 5% cost of living increase. The effect would be as follows:

1. Agent A was employed by a county paying 30% of his salary. Thus Agent A's salary was 70% state/federal funds and thus 70% was subject to the 5% cost of living

increase. Agent A would receive 5% of 10,500 (70% of 15,000) as an across the board raise. Thus if A received no other raise, A's raise would be $525.00 (5% of 10,500).

2. Agent B was employed by a county paying 57% of his salary. Thus Agent B's salary was 43% state/federal funds and thus 43% was subject to the 5% cost of living increase. Agent B would receive 5% of $6,450 (43% of 15,000) as an across the board raise. Thus if B received no other raise, B's raise would be $322.50 (5% of 6,456), a difference in across the board raise in annual salary for 1982. No other raises considered, A would receive in excess of over $200.00 per year simply as a result of the county percentage factor.

The record shows that every year some counties grant across the board increases in salary and some do not. NCAES does not utilize the funds allocated by the state/federal increases and take state salary money from those counties who support the program to fund county portions of raises in those counties who do not support the program with across the board raises. This factor causes a variance each year. (110a-111a, 135a, 383a) All one has to do is apply a county percentage across the board raise to A and B of different percentages and the margin in salary could be reduced or widened considerably. Such a factor is not created by imagination or ingenuity of counsel.

Tenure, educational level (i.e., masters or doctorate), size of program and area of skill are factors in an agent's salary, including having a skill which is particularly needed. (109a) Also inflation is a factor which cannot be overlooked in salary analysis. The cost of entrance level hiring has gone up and salaries have to be adjusted upward to keep abreast of starting salaries for assistant, associate and full agent, none of which have anything to do with race and are uniformly set. (115a)

These factors are real and non-discriminatory and are applied annually. The United States acknowledges that they are reasonable factors for consideration in salary analysis. (Pet. p. 20)

The merit salary process involves the one area of NCAES pay increase (excluding county merit) which is not across the Board. A discussion of the merit process is contained in the district court's opinion. (113a-116a). This process was found to be non-discriminatory and based upon a valid performance evaluation system. (154a-158a)

The Decision is not in conflict with other Courts of Appeals

Disregarding the foregoing facts about NCAES, its salary structure and process, Petitioners assert this decision with respect to salary is in conflict with other Courts of Appeals to the effect that Pre-Act, intentional discrimination cannot be used to justify Post-Act payment of lower salaries to blacks than to similarly situated white employees. This argument is specious on the facts of this case.

It is readily apparent that NCAES employees, both black and white are not similarly situated because of the varying real and differing factors affecting each one's salary and job requirements. The fact that CEC salaries in the 100 counties varied by as much as $4,900.00 in 1971 and by as much as $14,000.00 in 1981 clearly shows that NCAES employees, white and black have never been similarly situated and that no wage scales existed. This case is not in conflict with decisions of other Courts of Appeals cited by the United States.

Petitioners argue that this case should be reviewed and remanded in the face of the facts on this record which clearly refute their specious wage scale assertions so the "presently unclear" effects of the so-called "discriminatory wage scales" can be determined. This limp

assertion is diluted by the United States admission that it recognizes its own issue to be a "narrow one" and that what it asserts as a "lingering effect" of the pre-1965 NCAES system is buried in a complex matrix of post-Act salary decisions such that the so-called discriminatory effect is presently "unclear."

What Petitioners avoid is the fact that this is a disparate treatment case and that they failed to prove intentional discrimination at trial. The requirement of intentional discrimination as part of the United States' burden of proof is acknowledged by it in its petition. (Pet. p. 18) Petitioner also acknowledges that the plaintiff had to establish not only a disparity in average wages but also NCAES intent to discriminate in connection with salaries. (Pet. p. 18) This critical element it failed to prove at trial.

The district court determined the case to be one of disparate treatment under *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) requiring proof of intentional discrimination in Title VII claims of disparate treatment. In a disparate treatment case proof of discriminatory motive is critical. *Teamsters v. United States, supra*, 335.

The allocation and burden of proof in a Title VII disparate treatment pattern or practice case is governed by *Teamsters, supra.* It is important to note the district court's discussion of the pattern or practice claim:

> "A careful weighing and assessing of the plaintiffs' statistical and non-statistical evidence led the court to conclude that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices, and the analysis proceeded on this assumption. While not conceding that plaintiffs had made a prima facie case, the defendant Extension Service assumed the burden of articulating plausible reasons for its actions, and its evidence, which the court found convincing, has been set forth herein. When the plaintiffs failed to produce evidence to establish that defendant's reasons

> were pretextual plaintiff's case failed. *EEOC v. Korn Industries, Inc.*, 682 F.2d 256, 262 (4th Cir. 1981). (190a-191a)

It is clear Title VII disparate treatment and 42 U.S.C. 1981 claims both require proof of intentional discrimination. *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982). The district court found there was no intentional discrimination and that the reasons offered by NCAES were valid and plausible and not rebutted. (104a) The existence of intentional discrimination is for the trial court to decide. *Pullman v. Swint, supra.* The district court made no finding that NCAES established or maintained intentionally discriminatory wage scales.

Title VII became applicable to public employers in 1972. *Hazelwood School District v. United States, supra,* decided after *United Airlines v. Evans,* clearly held that a public employer (NCAES) who from that date forward (March, 1972) made all its employment decisions in a wholly non-discriminatory way did not violated Title VII even if it had maintained an all-white work force by purposefully excluding Negroes. Petitioners' argument is fraught with misleading statements. Assertions that the majority opinion holds that "North Carolina is free to pay blacks hired prior to 1965 less than whites for the rest of their lives" and to pay blacks based on "racially motivated pay schedules established in the past" are evidence of such distortions. The district court stated:

> "The court has been impressed by the absence in this case of so many of the usual badges of discrimination. For instance there was no evidence—that there is any difference in the entry level salaries of blacks and whites." (199a-200a)

Petitioners also ignore the fact that the district court carefully viewed the individual plaintiff's salary evidence and stated: —

> "The Court has therefore carefully reviewed plaintiffs' evidence showing individual salary comparisons and as a result has concluded that while that smile on its face and evidence unquestionably establishes salary disparities, when viewed in light of defendants' explanatory evidence it fails to prove discrimination." (122a-123a)

The district court was properly applying the *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) standards of proof when the district court analyzed individual plaintiffs' salary and promotion claims and considered them in determining the pattern or practice case. *Hazelwood* marked the point in time in which analysis of employment decisions by a public employer for purposes of violations of Title VII would start. An analysis by both the district court and the panel majority, as set forth in their opinions, clearly showed NCAE's employment decisions, including administration of salary, to be made in a wholly non-discriminatory way. The lack of proof of intentional wage discrimination coupled with the non-discriminatory salary process supports the decision that NCAES did not violate and was not violating Title VII in 1972 or to the present. Couple this with the findings, not appealed, that there was no discrimination in hiring, promotion, assignments, education opportunities, training or services and it is clear that the plaintiffs' distortion of the facts to attempt to lead the Court to believe that the NCAES salary process involved standardized "wage scales" at any time is specious. *Hazelwood* and *Evans* were properly followed here.

It is patently clear that petitioners' assertions are without merit and that the district court and court of appeals correctly decided the case on the evidence. No review is mandated here.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted, this 17th day of October, 1985.

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APPENDIX

EXHIBIT A

DX-196 1971-72% of County Contribution

SOUTHWESTERN	71/72%	1981	1976	1971
Alexander	40.72	25,089	16,730	14,263
Anson	31.08	21,000	18,080	13,474
Burke	47.86	27,152	18,303	14,040
Cabarrus	45.22	26,814	18,319	13,862
Caldwell	46.82	27,884	18,686	13,412
Catawba	41.27	28,788	18,537	14,619
Cleveland	36.87	27,204	18,801	13,600
Gaston	43.09	29,551	18,942	14,416
Iredell	39.12	30,901	20,574	14,308
Lincoln	41.36	26,391	16,754	15,399
Mecklenburg	52.42	29,500	19,150	13,975
Montgomery	36.56	26,000	18,471	12,742
Moore	48.50	24,185	17,610	12,752
Richmond	30.74	25,882	17,571	13,349
Rowan	39.25	27,871	21,622	15,976
Stanly	42.53	23,721	17,211	16,030
Union	36.65	31,004	17,500	14,760
TOTALS				
NORTH CENTRAL				
Chatham	35.95	28,116	18,940	13,910
Durham	39.60	27,015	18,375	13,375
Edgecombe	43.42	27,843	18,648	13,710
Franklin	27.69	24,842	17,023	13,106
Granville	38.22	30,402	Vacant	12,827
Halifax	42.73	31,177	19,159	14,596
Harnett	43.13	26,480	16,796	12,500
Johnston	44.20	33,765	21,217	15,145
Lee	35.93	21,584	17,680	13,008
Nash	40.36	25,990	17,135	12,936
Northampton	31.40	33,915	17,136	16,208
Orange	40.94	27,193	18,033	13,940
Person	27.85	26,045	18,480	13,206
Vance	37.01	22,740	18,325	13,466
Wake	44.30	29,458	21,800	16,588
Warren	29.73	24,244	17,730	13,400
Wilson	44.25	30,656	20,632	15,984
TOTALS				

DX 196(2) 1971-72% of County Contribution

WESTERN	71/72%	1981	1976	1971
Avery	8.27	22,500	17,800	11,621
Buncombe	33.18	32,681	21,595	14,806
Cherokee	26,26	26,141	17,784	12,314
Clay	12.11	20,000	17,350	12,421
Graham	31.45	25,581	16,500	12,918
Haywood	29.53	27,968	18,028	14,350
Henderson	34.00	29,561	18,203	13,301
Jackson	40.32	Vacant	19,350	13,170
Macon	30.25	29,459	18,400	12,806
Madison	18.21	27,546	18,300	12,596
McDowell	35.11	21,459	17,229	13,088
Mitchell	14.29	22,630	18,200	13,146
Polk	36.71	23,134	17,955	12,960
Rutherford	44.51	27,300	19,114	13,878
Swain	18.90	21,725	17,678	13,230
Transylvania	40.02	25,581	17,424	11,670
Yancey	18.76	25,323	17,350	12,043
TOTALS				
NORTHWESTERN				
Alamance	45.37	24,861	17,634	15,386
Alleghany	23.72	22,718	17,180	12,500
Ashe	26.94	21,052	16,276	12,198
Caswell	29.91	21,156	16,453	12,554
Davidson	45.33	29,067	19,328	15,474
Davie	30.13	29,492	18,283	13,575
Forsyth	53,46	30,155	22,243	16,230
Guilford	47.41	32,120	21,364	16,392
Randolph	46.42	31,384	17,655	13,924
Rockingham	50.68	27,592	21,860	16,646
Stokes	35.54	20,500	17,065	13,450
Surry	42.36	27,000	18,741	14,590
Watauga	26.38	24,762	16,993	13,728
Wilkes	39.44	26,530	18,977	14,667
Yadkin	30.59	27,270	16,646	13,388
TOTALS				

DX 196(3) 1971-72% of County Contribution

NORTHEASTERN	71/72%	1981	1976	1971
Beaufort	31.68	27,254	17,139	12,838
Bertie	23.96	25,275	16,484	13,001
Camden	15.96	25,285	16,356	11,726
Chowan	16.97	23,500	29,465	14,811
Craven	50.20	26,291	17,097	13,079
Currituck	28.40	26,292	18,337	12,868
Dare	22.12	23,260	16,028	11,601
Gates	18.16	29,564	19,209	12,355
Hertford	24.53	28,381	17,194	13,264
Hyde	18.85	28,490	18,284	12,682
Martin	40.58	29,426	18,805	13,143
Pamlico	20.82	23,000	18,189	13,243
Pasquotank	29.44	31,506	17,998	13,054
Perquimans	18.63	21,807	16,383	12,828
Pitt	43.32	27,556	19,848	14,581
Tyrrell	14.77	26,939	17,284	12,500
Washington	21.36	29,488	12,582	12,899
TOTALS				
SOUTHEASTERN				
Bladen	32.02	25,536	19,678	13,661
Brunswick	32.35	25,513	16,900	13,280
Carteret	37.56	27,655	17,806	13,227
Columbus	32.21	27,766	16,968	13,913
Cumberland	47.77	37,044	18,934	14,223
Duplin	30.85	26,878	18,615	14,156
Greene	30.31	26,860	18,000	12,792
Hoke	32.63	22,008	17,674	13,618
Jones	19.71	28,183	18,470	13,080
Lenoir	35.37	34,558	23,931	12,582
New Hanover	38.83	28,898	20,024	14,702
Onslow	39.19	24,783	17,422	12,524
Pender	27.57	25,295	16,871	12,252
Robeson	40.50	28,250	19,302	14,970
Sampson	37.27	34,577	19,490	13,862
Scotland	43.45	25,764	16,756	12,914
Wayne	44.14	28,962	21,532	16,278
TOTAL				

(5) (5)

Nos. 85-93, 85-428

Supreme Court, U.S.
FILED
NOV 5 1985
JOSEPH F. SPANIOL, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS BAZEMORE, *et al.*

BEST AVAILABLE COPY

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13 pp

TABLE OF AUTHORITIES

Cases	Page
City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978)	3
Connecticut v. Teal, 457 U.S. 440 (1982)	3
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) ..	6
General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982)	5,6,7
Guardians Association v. Civil Service Commission, ____ U.S. ____ (1983)	8
Mayor of Philadelphia v. Educational Equity League, 415 U.S. 605 (1974)	2
Segar v. Smith, No. 84-1200	2,4

Other Authorities

7 C.F.R. § 15.3(b)(6)(i)	7
A Uniform System of Citation (13th ed. 1981)	7

Nos. 85-93, 85-428

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

P. E. BAZEMORE, et al.,

Petitioners,

v.

WILLIAM C. FRIDAY, et al.

UNITED STATES OF AMERICA, et al.,

Petitioners,

v.

WILLIAM C. FRIDAY, et al.

On Petitions for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS BAZEMORE, ET AL.

Petitioners P. E. Bazemore, et al., submit this reply brief in response to the petition for writ of certiorari filed by the United States:

(1) Ten months ago the Solicitor General advised this Court that the conflicting views of the circuit courts regarding the use of statistical evidence was an important problem warranting review by this Court. Petition for Writ of Certiorari, Smith v. Segar, No. 84-1200. The Solicitor argued in Smith that the District of Columbia's method of evaluating statistical evidence involved "a significantly different approach in evaluating multiple regression analysis" than the Fourth Circuit decision in the instant case. (Id., 23). The Solicitor asserted the conflicting Fourth Circuit and District of Columbia Circuit practices were both unsound, characterizing the latter as a violation of standards established by several decisions of this Court.[1]

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[1] The Solicitor argued that the decision in Smith was in conflict with Mayor of Philadelphia v. Educational Equity League,

In his January 1985 petition in Smith the Solicitor read the Fourth Circuit opinion in this case, as do we, to require a plaintiff to include in any statistical analysis any variable that could possibly explain away racial disparities. In Bazemore, the Solicitor argued, there were

> nine independent variables that the court [of appeals] believed should have been but w[ere] not included in the multiple regression analysis included in that case.... We believe that the Bazemore court went too far...; our position is not that plaintiffs' multiple regression analysis must include any qualification that the employer at some point in the litigation asserts as necessary for the position at issue. (Petition, pp. 24-25).

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415 U.S. 605 (1974), Connecticut v. Teal, 457 U.S. 440 (1982), and City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Petition, pp. 22-23.

The Solicitor argued in Smith that a wage comparison of blacks and whites in the same job need not consider any other factors unless the employer utilized some clearly established standard to set different salaries for employees doing the same work.

In the instant case the Solicitor appears to embrace the fourth circuit doctrine he earlier repudiated, now asserting that a wage comparison of blacks and whites in the same job is of no evidentiary significance unless that analysis includes all "factors that normally would be expected to account for salary differentials." (Petition, p. 9). Like the court below, the Solicitor sees no need for a defendant to offer any evidence that these factors were actually utilized in setting salaries, or to demonstrate that including those variables would actually affect proven disparities

in the salaries of blacks and whites. On this view, a court should reject statistical evidence whenever that court, or an employer, can hypothesize any "reasonable" factor that might have affected the salaries in dispute. (Id, 19-20). The Solicitor in January of this year regarded that doctrine as both incorrect and in conflict with other appellate decisions, and we concur with his original view of the matter.

(2) The Solicitor urges that the fourth circuit was correct in holding that Title VII permits an employer to avoid legal responsibility for employment decisions by delegating those decisions to a third party. (Petition 20-21). The Solicitor does not dispute the obvious importance of this issue, but insists that this Court resolved that very question in General Building Contractors Ass'n. v. Pennsylvania, 458 U.S. 375 (1982).

General Building Contractors, of course, was a section 1981 case, and the decision there turned on the fact that section 1981, unlike Title VII, requires proof of discriminatory intent.

The Solicitor asserts General Building Contractors is also a definitive interpretation of Title VII because that decision cited a Title VII case, Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978). The passage from Furnco referred to in General Building Contractors, however, has nothing to do with whether an employer can delegate away its Title VII obligations.[2] The signal preceding the citation to Furnco is "Cf.", which indicates that the cited material

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[2] "Title VII ... does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." 438 U.S. at 577-78.

does not contain the same holding as the General Building Contractors opinion in which it was cited.[3]

(3) The applicable regulations of the United States Department of Agriculture require a state such as North Carolina which established its 4-H club system on a de jure segregated basis to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. § 15.3(b)(6)(i). There is no dispute that respondents have never taken, and do not intend to take, such action, and thus remain in violation of that regulation. The Solicitor General, as attorney for the Secretary of Agriculture, evidently has no interest in enforcing the Department's regulations. We do, and the

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[3] Cf. indicates that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare'." A Uniform System of Citation, 9 (13th ed. 1981).

parties to enforce such Title VI regulations was clearly established by Guardians Association v. Civil Service Commission, ____ U.S. ____, 77 L.Ed.2d 866, 103 S.Ct. 3221 (1983).

(4) The Solicitor suggests that it does not matter whether the denial of class certification was erroneous, since the government intervened in 1972 seeking the same relief requested in the private class action. (Petition, p. 22). Elsewhere in his petition, however, the Solicitor abandons the salary claims of all black employees hired after 1965 (id., pp. 19-20), the promotion claims of all black employees denied positions as county chairmen (id., pp. 20-21), and the claims of black employees who object to serving racially segregated 4-H and Extension Homemaker Clubs. (Id., pp. 21-22). The certification issue may have seemed of little practical importance while the

Department of Justice was still championing each of these claims, but the Solicitor's decision to abandon those claims makes the availability of certification of vital importance. If the Court grants certiorari on questions 2, 3, or 4, it should grant certiorari on question 5 as well, in order to assure that the interests of putative class members will continue to be fully represented and enforced.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the fourth circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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CLERK

(a) (b)

Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P.E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI IN NO. 85-93 FILED JULY 15, 1985

PETITION FOR A WRIT OF CERTIORARI IN NO. 85-428 FILED SEPTEMBER 12, 1985

CERTIORARI GRANTED NOVEMBER 12, 1985

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-93

P.E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

No. 85-428

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

INDEX*

	Page
Chronological List of Docket Entries from the United States Court of Appeals for the Fourth Circuit	1
Chronological List of Docket Entries from the United States District Court for the Eastern District of North Carolina	5
Memorandum of Decision and Order of October 9, 1979 [C.A. App. 20-30]	73
Order of July 29, 1981 [C.A. App. 31-32]	86

---

*The opinions of the district court and the court of appeals are printed in the separately bound appendix to the petition in No. 85-93. The notice of judgment of the court of appeals is printed in the appendix bound with the petition in No. 85-428.

Index – Continued: Page

Transcript of Trial Testimony of Thomas Blalock (excerpts) [Tr. 3811, line 2 thru Tr. 3814, line 3 (C.A. App. 888-891); Tr. 3907, line 11 thru Tr. 3914, line 6 (C.A. App. 896-903)] 88

Transcript of Trial Testimony of Donald Stormer (excerpts) [Tr. 4979, line 13 thru Tr. 4980, line 2 (C.A. App. 1097-1098); Tr. 4986, line 14 thru Tr. 4988, line 18 (C.A. App. 1100-1102); Tr. 4992, line 12 thru Tr. 4996, line 21 (C.A. App. 1106-1110); Tr. 5028, line 1 thru Tr. 5032, line 21 (C.A. App. 1125-1129)] 94

Government Exhibits

GX 30 – Membership in Extension Homemaker Clubs 1966-1972 [C.A. App. 1797-1805] 103

GX 69 – County Extension Chairman Appointments 1968-1981 [C.A. App. 1736-1742] 114

GX 74 – Promotions to County Chairman 1962-1981 [C.A. App. 1745] 127

GX 98 – Analysis of 1971 Effort to Equalize Salaries of Blacks and Whites [C.A. App. 1560] 128

GX 157 (excerpt) – Handwritten Memorandum on Salary Adjustments by Thomas Blalock, 1971, ¶¶ 7-21 [C.A. App. 1605-1609] 129

GX 173 – USDA Memorandum of May 9, 1978 on Trends in State 4-H Affirmative Action Programs [C.A. App. 1810-1813] 131

GX 182 (excerpts) – 1974 Civil Rights Initiatives for Discussion at Meeting on April 5, 1974 (Draft), ¶¶ 3 & 7 [C.A. App. 1823-1824, 1827] 135

Government Exhibits – Continued: Page

GX 184 – Memorandum of May 3, 1974, with 1974 Civil Rights Initiatives [C.A. App. 1832-1836] 137

GX 191 – Memorandum of March 31, 1977 on Affirmative Action Initiatives for 4-H and Extension Homemaker Clubs [C.A. App. 1844] 141

GX 192 – Letter of April 4, 1977 on Affirmative Action Initiatives for 4-H and Extension Homemaker Clubs [C.A. App. 1845-1846] . 142

GX 193 – Memorandum of April 18, 1978 on Meeting Structure for Extension Homemakers [C.A. App. 1847-1848] 144

GX 194 – Letter of April 25, 1978 on Meeting Structure for Extension Homemakers [C.A. App. 1849] 146

GX 195 – Memorandum of September 4, 1978 on Membership Drive for Extension Homemakers [C.A. App. 1850] 147

GX 198 – Letter of November 14, 1979 on Pending Litigation [C.A. App. 1856] 149

GX 199 – Letter of November 15, 1979 on Implementation of "All Reasonable Efforts" in Extension Programs [C.A. App. 1857] 150

GX 200 (excerpts) – Strengthening 4-H Programs Through Affirmative Action [C.A. App. 1859, 1883-1886, 1893] 151

GX 201 – Memorandum of February 29, 1980 on Implementation of "All Reasonable Efforts" in Extension Program [C.A. App. 1904] 157

GX 214 – Letter of July 6, 1973 on Professional Salaries in 1971-1972 [C.A. App. 1610] 159

Defendants' Exhibits: Page

DX 78 (excerpt)—Memorandum of Understanding Between the N.C. Agricultural Extension Service and the Board of County Commissioners [C.A. App. 1683-1685] 161

DX 196—County Chairman Salaries for 1971, 1976 & 1981, and 1971-72 Percent of County Contribution 165

DX 201—December 1976 Salary Summary [C.A. App. 2227] 168

DX 202—February 1979 Salary Summary [C.A. App. 2228] 169

DX 203—November 1979 Salary Summary [C.A. App. 2229] 170

DX 204—April 1980 Salary Summary [C.A. App. 2230] 171

DX 205—April 1981 Salary Summary [C.A. App. 2231] 172

DX 219—Trends in the North Carolina 4-H Program 1971-1980 [C.A. App. 2242] 173

DX 221—Percent of Potential Youth Reached With 4-H Programs [C.A. App. 2243] 175

DX 222—Number of People Served by Extension 4-H Staff [C.A. App. 2244] 176

DX 227—4-H Volunteers and Membership [C.A. App. 2248] 177

DX 228—Single Racial Clubs in Mixed Communities [C.A. App. 2249] 178

DX 255—Salary Data for Employees Not Included in 1975 Regressions [C.A. App. 2310-2311] 179

DX 258—Non-Extension Homemakers Audiences [C.A. App. 2323] 180

Order Granting Certiorari in No. 85-93 181

Order Granting Certiorari in No. 85-428 182

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1873

P.E. BAZEMORE, ET AL., PLAINTIFFS-APPELLANTS,

v.

WILLIAM C. FRIDAY, ET AL., DEFENDANTS-APPELLEES

APPEAL FROM THE EASTERN DISTRICT
OF NORTH CAROLINA AT RALEIGH

DATE	FILINGS – PROCEEDINGS
10/05/82	Case docketed. Awaiting ROA. tcb.
10/08/82	ORDER cons. cases 82-1873 and 82-1881 for briefing and oral argument, filed. tcb
10/14/82	DISCLOSURE STMNT, Es, N, filed. tcb
10/14/82	DISCLOSURE STMNT, Es, N, filed. tcb (case 82-1881)
10/19/82	DISCLOSURE STMNT, As, N, filed. tcb
10/21/82	DISCLOSURE STMNT, As, N, filed. tcb
10/21/82	DISCLOSURE STMNT, As, N, (82-1881), filed. tcb
10/26/82	ORDER cons. case 82-1927 with 82-1873(L) and 82-1881 for briefing and oral argument, filed. tcb
11/01/82	DISCLOSURE STMNT, Es (82-1927), N, filed. tcb
11/02/82	DISCLOSURE STMNT, Es (82-1927), N, filed. tcb
11/05/82	MOTION (K-53) of As for leave to file separate briefs and lead counsel, filed (SAR:jeh)
11/15/82	RESPONSE/Es to motion K-53, filed. (SAR:fls)

11/23/82 ORDER granting motion of As for leave to file separate brfs. and lead counsel, and establishing brf. schedule: As due: 1/03/83, filed. (SAR:fls)

11/30/82 ORDER cons. case 82-2065 with 82-1873(L), 82-1881 and 82-1927 for briefing and oral argument, filed. Briefing order of 11/23/82 to be adhered to. tcb.

12/6/82 MOTION (L-65) of USA for leave to defer filing the appendix pursuant to Rule 30(c), FRAP, filed (CRL:jeh) MOTION DENIED

12/10/82 RESPONSE of Es to motion L-65, filed (CRL:jeh)

12/13/82 MOTION (L-66) of As-P. E. Bazemore, et al, for extension of time to file brf, filed (CRL:jeh) MOTION DENIED

12/16/82 MOTION (L-113) of government for extension of time to file brf., filed. MOTION DENIED. (CRL:fls)

12/21/82 MOTION (L-145) of A, USA, for reconsideration of denial of procedural motions, filed. (CRL:fls)

12/22/82 RESPONSE/Es to motion L-145, filed. (CRL:fls)

12/28/82 ORDER granting motion for reconsideration (L-145) of denial of procedural motions and granting extension of time to file As' brfs. and appx. to 1/17/83, filed. (CRL:fls) Copy to Thigpen; Reibman; Craige-Reynolds-Barnett-Marblestone; Manning-Manning; Rich., Greenberg-Schnapper. (Mo. re deferred appx. denied—plm)

12/23/82 MOTION (L-193) of private plaintiffs-As for reconsideration of denial of procedural question, filed. (CRL:fls) (See order L-145)

12/23/82 DISCLOSURE STMNT, Es, (82-2065), N, filed 12/06/82. tcb

12/23/82 DISCLOSURE STMNT, Es, (82-2065), N, filed 12/07/82. tcb

01/03/83 DESIGNATION-Es, parts to be included in joint appendix, filed. tcb

01/20/83 MOTION of Ps-As P. E. Bazemore for leave to file brief in excess of 50 pages (A-152), filed (PLM:bel)

1/21/83 Supplemental motion of As (A-152), filed (PLM:jeh)

1/26/83 ORDER granting motion of As to file brief in excess of 50 pages, not to exceed 65 pages, filed (PLM:jeh) Copy to Reibman; Manning; Rich; Craige-Reynolds-Barnett-Marblestone; Thigpen

1/31/83 MOTION (B-18) of Es' for extension of time to file brief and motion for leave to file brief in excess of 50 pages, filed (PLM:bel) Submitted to HEW*, FDM on 2-14-83.

2/22/83 ORDER granting Es' motion for extension of time to March 7, 1983 to file brief and for leave to file brief not in excess of 95 pages, filed. (PLM:bel) Copy to: Reibman; Manning; Rich; Craige-Reynolds-Barnett-Marblestone; Thigpen; Greenberg-Schnapper-Sherwood;

3/7/83 MOTION (C-90) of As for additional time within which to file reply brief, filed (BMM:jeh)

3/16/83 ORDER granting As an additional 7 days to file reply brief, filed (BMM:jeh) Copy to Thigpen; Reibman; Craige-Reynolds-Barnett-Marblestone; Manning-Manning; Rich; Greenberg-Schnapper-Sherwood

12/19/84 E's bill of costs, filed. dhp

12/26/84	A's petition for rehearing and suggestion for rehearing en banc filed. Transmission of petition for rehearing held pending decision of US motion to extend time to file rehearing also. dhb
12/26/84	MOTION of United States (L-160) for ext. of time to 1/7/85 to file pet. for rehearing and suggestion for reh. in banc, filed. jd
1/3/85	ORDER granting motion L-160. (BMM:jd) Copy to counsel.
1/2/85	PETITION FOR REHEARING (A-13) and suggestion for rehearing in banc of As, filed (DHB:jm)
1/7/85	Petitions filed 12/26/84 and 1/2/85 transmitted to HEW, JDP, Judge Kellam w/copy to all circuit judges (DHB:jm)
2/4/85	MOTION of Es (B-13) for an ext. of time to 2/14/85 to file answer to pet. for rehearing, filed. jd
2/6/85	ORDER granting motion B-13. (BMM:jd) Copy to counsel.
2/14/85	RESPONSE (A-13 & L-161) of Es to both petitions for rehearing and suggestions for rehearing in banc, filed (DB:cw) Transmitted to HEW, JDP, RBK on 2-15-85.
4/15/85	ORDER denying pet. for reh. and sug. for reh. in banc in these appeals, filed (BMM:nac) Copy to counsel on 4/16/85.
4/22/85	Bill of costs taxed. Copies to Thigpen, Reibman, Rich, Manning/Manning, Marblestone, et al., Greenberg, et al. lgs

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

No. 2978 Civil

Raleigh Division

P.E. Bazemore, et al., plaintiffs

v.

William C. Friday, et al., defendants

DATE	NR	PROCEEDINGS
11/18/71	1	Filed & Ent. PETITION FOR JUDGMENT DECLARING, PERMANENT INJUNCTION, RESTRAINING DEFENDANTS FROM DISCRIMINATING POLICIES AND PRACTICES IN EMPLOYMENT—Allege all defendants are bi-racial and are discriminating against all classes, seek any further relief and grant costs and attorney fee to plaintiffs.
		Filed & Ent. COST BOND—$200.00 cost bond, Surety, US Fidelity Co.
		Issued Summons, Original and 12 copies to USM for service, w/12 copies petition.

11/29/71		Filed & Ent. US MARSHAL RETURN – Served Adm. Lear by cert. mail 11/22/71.
		Filed & Ent. US MARSHAL RETURN – Served Chancellor Caldwell Univ. N. C. 11/23/71.
		Filed & Ent. US MARSHAL RETURN – Served Director Hyatt, Jr. N. C. Agric. 11/22/71.
		Filed & Ent. US MARSHAL RETURN – Served Board Trustees UNC 11/22/71.
		Filed & Ent. US MARSHAL RETURN – Served Charles L. Becton 11/22/71.
		Filed & Ent. US MARSHAL RETURN – Served C. Hardin, Sec. Agric. 11/22/71.
		Filed & Ent. US MARSHAL RETURN – Served C. Amick, Alamance CC. 11/19/71.
		Filed & Ent. US MARSHAL RETURN – Served C. Hardin, Sec. Agric. by mail 11/29/71.
		Filed & Ent. US MARSHAL RETURN – Served UNC Chapel Hill 11/19/71.
12/2/71		Filed & Ent. US MARSHAL RETURN – Served Meckleng CC 11/29/71.
12/7/71	2	Filed & Ent. US MARSHAL RETURN – Served Edgecombe CC 11/26/71.
1/7/72	3	Filed & Ent. ANSWER – All State and County officials designated in complaint fully answers the

		complaint, denies all charges, ask plaintiff's recover nothing and cost of action be taxed against plaintiffs. w/copy and cert. service.
1/17/72	4*	Filed & ent. ORDER that defts. are allowed until & including 2/22/72 within which to file answer or other pleading in action. (DUPREE, J.) (Civ. O.B.#23,P.7253) 1 cy to U.S.A.
2/17/72	5	Filed & ent. ORDER allowing defts. to & including 3/23/72 within which to file answer or other pleading in action. (DUPREE, J.) (Civ.O.B.#23, P.7331) 2 CC to U.S.A.
3/22/72	6	Filed & ent. CONSENT ORDER allowing defts. to & including Apr. 7, 1972 within which to file answer or other pleading. (DUPREE, J.) (Civ.O.B.#23, P.7409)
4/7/72	7	Filed & ent. MOTION TO DISMISS FEDERAL DEFENDANTS AND TO AMEND COMPLAINT w/Cert. of Ser.
	8	Filed & ent. MOTION TO INTERVENE AS PLAINTIFF by U.S.A. 4 cc to U.S.A.
	9	Filed & ent. MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE w/Cert. of Ser. 4 cc to U.S.A.

	10	Filed & ent. ORDER that U.S.A. is allowed to file a Complaint in Intervention. (DUPREE, J.) (Civ.O.B.#24, P.7463) 4 cc to U.S.A.
	11	Filed & ent. COMPLAINT IN INTERVENTION by U.S.A. praying for order enjoining defts. from failing to provide services to minorities equal to those they provide white persons; maintaining racially segregated 4-H clubs & extension homemaker clubs; providing services to 4-H clubs, extension homemaker clubs, farmers & other persons on racially segregated basis; from discriminating in favor of white persons & against minorities in hiring & promotion & in terms & conditions of employment in extension service jobs & for costs & disbursements of action.
	12	Filed & ent. CERTIFICATE OF THE ATTORNEY GENERAL OF THE UNITED STATES
4/21/72	13	Filed & ent. THIRD-PARTY COMPLAINT by William C. Friday, Pres. of Consolidated Univ. of N.C., et al.
		Issued Summons w/Third-Party Complaint to U.S. Marshal for service: Orig. & 8 cc to U.S.M.

4/28/72	14	Filed & ent. ORIGINAL ANSWER TO COMPLAINT IN INTERVENTION by defts., being all those State & County officials designated in Complaint in Intervention, answering Complaint of plff-intervenor, U.S.A.-praying that plff.-interv., U.S.A., have & recover nothing of defts. & that action be dismissed & costs taxed against plff.-interv. w/Cert. of Ser.
	15	Filed & ent. AMENDMENT TO THIRD-PARTY COMPLAINT, w/Cert. of Ser.
2/7/72	4-A	Filed & ent. INTERROGATORIES TO DEFTS. PROPOUNDED BY PLFF. w/CS
4/28/72		Fil. & ent. U. S. MARSHAL'S RETURN on 3rd-Party Complaint: Earl L. Butz, Sect. of Agri. served 4/24/72 by cert. mail #384 to Washington, D. C. 5 cc to U.S. Atty
	16	Filed & ent. U. S. MARSHAL'S RETURN On 3rd-party complaint: Gene M. Lear, Associate Admr., Agric. Ext. Serv., served 4/24/72 by Cert.Mail #383 to Washington, D.C. Asst. U.S. Atty., John R. Whitty, Raleigh, NC also served.
6/12/72	17	Filed & ent. REQUEST FOR PRODUCTION OF DOCUMENTS filed by U.S., Plff-interv. w/Cert. of Ser.

6/22/72	18	Filed & Ent. THIRD PARTY DEFENDANTS MOTION TO STRIKE OR IN THE ALTERNATIVE DISMISS THIRD PARTY COMPLAINT w/copy and cert service.
	19	Filed & Ent. MEMORANDUM OF THIRD PARTY DEFENDANTS IN SUPPORT OF MOTION TO STRIKE OR IN THE ALTERNATIVE TO DISMISS THIRD PARTY COMPLAINT w/copy and cert. service.
6/30/72	20	Filed & ent. DEFENDANT THIRD-PARTY PLAINTIFFS' RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS w/Cert. of Ser.
7/12/72	21	Filed & ent. DEFT. THIRD PARTY PLFFS'. RESPONSE TO MOTION TO STRIKE OR DISMISS THIRD-PARTY COMPLAINT, w/certificate of service. 2 copies.
	22	Filed & ent. MEMORANDUM IN SUPPORT OF DEFENDANT THIRD-PARTY PLAINTIFFS' RESPONSE TO MOTION TO STRIKE OR DISMISS THIRD-PARTY COMPLAINT. 2 copies.
7/17/72	23	Filed & ent. MOTION FOR ORDER REQUIRING INSPECTION OF DEFENDANTS RECORDS. 2 copies. (filed by plff.-intevenor.)

	24	Filed & ent. MEMORANDUM IN SUPPORT OF MOTION FOR ORDER REQUIRING INSPECTION OF DEFENDANTS RECORDS, filed by Plff.-Intervenor. 2 copies.
7/18/72	25	Filed & ent. ORDER REQUIRING INSPECTION OF RECORDS—deft. third-party plffs. permit plff-intervenor inspect and copy Items 1(f) and 2(c) in plff-intervenor's Request for Production of Documents previously filed herein; Clerk to service copies of this Order upon counsel. DUPREE, J. Civil OB 24, P. 7772.
7/21/72	26	Filed & ent. ORDER that Earl L. Butz, Sect. of Agri., & Gene M. Lear, Asso. Admr. of Federal Extension Ser., in indiv. & official capacities, are realigned as plff-intervenors. All claims & requests for relief set forth in 3rd-party Complaint are preserved as defenses and/or counterclaims. (DUPREE, J.) (Civ. O.B.#24,P.7787) 2 CC & 4 cys. to U.S.A.
7/21/72	27	Filed & ent. ORDER by consent that time within which discovery may be completed is extended to & including 1/10/73. (DUPREE, J.)(Civ.O.B.#24, P.7788) 2 CC & 4cys to U.S.A.

9/7/72	28	Filed & ent. INTERROGATORIES TO PLAINTIFFS propounded by defts. (State Depts.) w/Cert. of Ser.
9/25/72	29	Filed & ent. INTERROGATORIES TO DEFENDANTS BY PLAINTIFF-INTERVENORS
9/29/72		Filed & ent. CERTIFICATE OF SERVICE as to foregoing Interrogatories to Defendants by Plff.-Intervenors
	30	Filed & ent. PLAINTIFF-INTERVENORS' REQUEST FOR PRODUCTION OF COMPUTER MATERIALS w/Cert. of Service
10/18/72	31	Filed & ent. DEFENDANTS' ANSWERS TO INTERROGATORIES OF PLAINTIFF-INTERVENORS W/Cert. of Ser.
	32	Fil. & ent. DEFENDANTS' REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS w/Cert. of Ser.
11/17/72	33	Fil. & ent. DEFENDANTS' REQUEST FOR ADMISSION UNDER RULE 36 w/Cert. of Ser.
11/20/72	34	Filed & ent. RESPONSE TO DEFENDANTS' REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS w/Cert. of Ser., Attachments & Exhibits

11/27/72	35	Fil. & ent. INTERROGATORIES TO DEFENDANTS BY PLAINTIFF-INTERVENORS w/Cert. of Ser.
	36	Filed & ent. REQUEST FOR PRODUCTION OF DOCUMENTS w/Cert. of Ser. (Filed by plff.-intervenor)
11/30/72		Filed & ent. NOTICE OF TAKING DEPOSITIONS, by U.S.A., et al—plff-intervenors, of the following persons: Dr. George Hyatt, Jr., 12/11/72; Dr. C. D. Black, 12/12/72; Dr. Eloise Cofer 12/12/72—at Ricks Hall, N.C.State Univ., Raleigh, NC & Dr. R.E. Jones, 12/12/72 at Coltrane Hall, A&T State Univ., Greensboro, NC.w/Cert. of Ser.
12/4/72	37	Filed & ent. DEFENDANTS' INTERROGATORIES TO PLAINTIFF-INTERVENORS w/Attachments
12/20/72	38	Filed & ent. PLAINTIFFS' ANSWER AND RESPONSE TO DEFENDANTS REQUEST FOR ADMISSION UNDER RULE 36/Cert. of Ser.
12/20/72		Filed & ent. MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANTS' REQUEST FOR ADMISSIONS UNDER RULE 36 of THE FEDERAL RULES OF CIVIL PROCEDURE w/Cert. of Ser.

	39	Filed & ent. ORDER extending time for U.S.A. to answer defendants' motion to & including 1/4/73. (DUPREE, J.) (Civ.O.B.#25,P.8140) 6 CC to U.S.A.
12/26/72	40	Filed & ent. REQUEST FOR PRODUCTION OF DOCUMENTS from State defts. by U.S. Plff.-Intervenor w/Cert. of Ser.
		Filed & ent. NOTICE OF TAKING DEPOSITIONS by U.S., et al., Plff.-Intervs., of following persons: 10:00 A.M., 1/3/73: Dr. George Hyatt, Jr.; 10:00 A.M., 1/4/73 Mrs. Ada Dalla Pozza, 2:00 p.m. Mrs. Minnie M. Brown; 9:00 A.M., 1/5/73 Dr. George Capel, J.E. Foil; 10:00 a.m., 1/8/73 R. Craig Wilburn; 1:30 p.m. T.C. Blalock; 9:30 a.m., 1/9/73 Paul Dew; 2:00 p.m., W.G. Andrews; 9:30 a.m., 1/10/73 J.C. Jones, 2:00 p.m. Grover Dobbins; & 9:30 a.m., 1/11/73 John E. Piland, w/Cert. of Ser.
1/2/73	41	Filed & ent. MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANTS' REQUEST FOR INTERROGATORIES UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE w/Cert. of Ser. 4 CC to U.S.A.

	42	Filed & ent. ORDER granting motion that U.S.A. be allowed extension of time to & including 1/23/73 in which to answer defendant's interrogatories. (DUPREE, J.) (Civ.O.B.#25, P.8191) 4 CC to USA (will serve order)
1/3/73		Filed & ent. DEPOSITION OF ROBERT E. JONES (Unopened by Clk.)
1/4/73	43	Filed & ent. PLAINTIFF-INTERVENORS' RESPONSE TO DEFENDANTS' REQUEST FOR ADMISSION UNDER RULE 36 w/Attachment & Cert. of Ser.
1/9/73		Filed & ent. DEPOSITION OF DR. ELOISE COFER (Unopened by the Clk.)
1/15/73	44	Filed & ent. ORDER by consent that discovery time be extended to & including 3/23/73. (DUPREE, J.) (Civ.O.B.#25, P.8230) 3 CC to U.S.A. who will serve copies.
1/18/73		Fil. & ent. DEPOSITION OF DR. CHESTER BLACK (Unopened by Clk.)
1/23/73	45	Fil. & ent. ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFF INTERVENORS w/Cert. of ser.
2/14/73		Filed & ent. DEPOSITION OF GROVER C. DOBBINS. (Unopened by Clk.)

2/23/73		Filed & ent. DEPOSITION OF DR. GEORGE HYATT. (Unopened by Clk.)
3/1/73		Filed & ent. DEPOSITION OF DR. THOMAS C. BLALOCK (Unopened by Clk.)
3/5/73		Fil. DEPOSITION OF J. E. FOIL (Unopened by Clk) (Ent. 3/6/73) crs
3/16/73		Filed & ent. DEPOSITION OF JOHN PILAND (unopened by Clk.)
		Fil. & ent. DEPOSITION OF MINNIE BROWN (unopened by Clk.)
		Fil. & ent. DEPOSITION OF DR. GEORGE CAPEL (unopened by Clk.)
3/21/73	46	Fil. & ent. INTERROGATORIES TO DEFENDANTS BY PLAINTIFF-INTERVENORS w/Cert. of Ser.
3/30/73	47	Filed & ent. PLAINTIFFS ANSWERS TO INTERROGATORIES w/Cert. of Ser.
4/9/73		Filed & ent. DEPOSITION OF RONALD C. WILBURN (Unopened by Clk.)
		Fil. & ent. DEPOSITION OF ADA DALLA POZZA (Unopened by Clk.)
4/19/73		Filed & ent. DEPOSITION OF QUENTIN SWANSON (Unopened by Clk.)
		Filed & ent. DEPOSITION OF PAUL DEW (Unopened by Clk.)

4/20/73	48	Fil. & ent. DEFENDANTS' ANSWERS TO PLAINTIFFS INTERVENORS INTERROGATORIES Statement of service in transmittal letter. (Exhibits attached to answers)
5/7/73		Fil. & ent. DEPOSITION OF DR. W. G. ANDREWS (unopened by Clk.)
5/16/73		Filed & ent. DEPOSITION OF J. C. JONES (Unopened by Clk.)
5/18/73	49	Fil. & ent. DEFENDANT'S ANSWERS TO PLAINTIFF-INTERVENORS MARCH 20, 1973, INTERROGATORIES w/Exhibits
12/11/73		Set for Pre-trial and hearing on 3rd-party defts. Motion to Strike or in alternative Dismiss 3rd-party Complaint – 1/9/74 at 11:00 a.m. smf
12/26/73	50	Filed & ent. MOTION FOR LEAVE TO WITHDRAW AND FOR ORDER SUBSTITUTING OTHER COUNSEL FOR PLAINTIFFS: Atty Chambers has been appointed as a member of the Board of Governors of the U. of N.C. Charles Becton is also a member of said firm – Jerry Paul and James Rowan, 202 Rigsabee Ave., Durham, N.C. have been retained by the plfts. Cert. of Ser. B.H. Shapiro, U.S. Dept.

		of Justice, T. McNamara, U.S. Atty. EDNC., Raleigh, North Carolina, A.A. Vanore, Jr. Deputy Atty. General. P.O. Box 629, Raleigh, North Carolina mailed on 12/21/73. gw
1/3/74	51	Filed & ent. ORDER—firm of Chambers, Stein, Ferguson & Lanning, J. LeVonne Chambers, Esq., Charles Becton, Esq, are allowed to withdraw as counsel in this case. Motion hearing scheduled for 1/9/74 is cont'd until 2:00 p.m. on Friday, February 1, 1974, Courtroom #1, 7th Floor, Federal Building, Raleigh, North Carolina (DUPREE, J) CivOB#28P 9339 cc: attys. Paul, Becton, Chambers, Draw, Shapiro & Rich ag
1/18/74	52	Filed & ent. NOTICE OF APPEARANCE by Jerome Paul and Sylvia Drew on behalf of plffs. in this action. w/Cert. of Ser. jwt
1/25/74	53	Filed & ent. ORDER that matter scheduled to be heard in this case on 2/1/74 is now moot & the scheduled hearing is therefore continued. (DUPREE, J.)(Civ.O.B.#28, P.9427) CC to counsel jwt

4/1/74		Scheduled for pre-trial conference at Raleigh, Thurs., 4/25/74 at 12:30 P.M. Cy. to counsel, Judges Butler & Dupree & Ct. Rptr. jwt
4/5/74	54	Filed & ent. MOTION TO CONTINUE PRETRIAL CONFERENCE by all parties.
	55	Filed & ent. ORDER that pre-trial conf. scheduled for 4/25/74 is continued for at least 60 days. (DUPREE, J.) (Civ.O.B.#29, P.9678) Atty. Rich serving copies jwt
4/10/74		Filed & ent. CERTIFICATE OF SERVICE for Motion and Order filed on 4/5/74, service 4/8/74 by Atty. Rich. gw
11/13/74		Calendared for pre-trial conf. at Raleigh, Fri., 12/13/74 at 9:30 A.M. Cy. to Judges Butler & Dupree, Counsel & Ct. Rptr. jwt
11/27/74	56	Filed & ent. ORDER that pre-trial conf. scheduled for 12/13/74 is continued & will now be held at 11:00 a.m., Fri., 1/3/75 in Judge's Chambers, 716 Fed. Bldg., Raleigh, N.C. (DUPREE, J.) (Civ.O.B.#31, P.264) Cys. to counsel by Judge's office jwt

1/3/75	57 57-a	Filed & ent. MOTION TO CERTIFY AS CLASS ACTION and MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY AS CLASS ACTION w/Cert. of Ser. & Proposed Order
		Pre-trial conf. at Raleigh
	58	Filed & ent. PLAINTIFF-INTERVENORS' MOTION TO DISMISS, OR IN ALTERNATIVE TO STRIKE DEFENDANTS' COUNTERCLAIM w/Cert. of Ser. & Attachments & MEMORANDUM
1/2/75	59	Filed & ent. AFFIDAVIT PURSUANT TO RULE 7P of the RULES OF COURT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA CONCERNING SANCTIONS FOR FAILURE TO COMPLY WITH PRETRIAL PROCEDURES w/cert. of ser.
1/3/75	60	Filed & ent. PLAINTIFF-INTERVENORS' PROPOSED STIPULATION OF FACT
	61	Filed & ent. STIPULATION of U.S.A. as to exhibits to be offered—signed by U.S. atty. only.
	62	Filed & ent. MEMORANDUM OF PRETRIAL COMPLIANCE by U.S.A. w/Attachments

	63	Fil. & ent. ORDER ON INITIAL PRE-TRIAL CONFERENCE – defts. to provide opposing counsel w/list of all exhibits proposed to be offered on or before 1/31/75; case to be tried to court w/out a jury & est. trial time is from 6 to 8 wks.; defts. have 20 days from this date to respond to motion to strike counterclaim as well as response to motion to have case certified as class action; final pre-trial conf. to be held in Chambers at Raleigh on Fri. 5/30/75 at 11:00 a.m. at which time trial time will be assigned. (DUPREE, J.) (Civ. O.B.#32,P.104) Cy. to counsel by Judge's office jwt
1/23/75	64	Filed & ent. DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENORS' MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STRIKE DEFENDANTS' COUNTERCLAIM w/Cert. of Ser. Cy. to J. Dupree
	65	Filed & ent. BRIEF IN OPPOSITION TO PLAINTIFF-INTERVENORS' MOTION TO CERTIFY AS A CLASS ACTION w/Cert. of Ser. Cy. to J. Dupree
1/31/75	66	Received DEFENDANTS' EXHIBIT LIST and WITNESS LIST jt
2/7/75	67	Fil. & ent. ORDER that time within which plff.-intervenor, U.S.A., may file a Motion for

		Leave to Amend Complaint in Intervention is extended to & including 3/3/75. (DUPREE, J.) (Civ.O.B.#32,P.202) 2 CC & 3 cys. to U.S.A. jwt
2/14/75	68	Filed & ent. REPLY BRIEF IN SUPPORT OF UNITED STATES' MOTION TO CERTIFY AS A CLASS ACTION w/Exhibit A & Cert. of Ser. jwt
2/19/75	69	Filed & ent. AFFIDAVIT IN RESPONSE TO AFFIDAVIT FILED BY MARY A. PLANTY, DATED DECEMBER 31, 1974, PURSUANT TO RULE 7P OF THE RULES OF COURT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA CONCERNING SANCTIONS. W/Cert. of Ser. jwt
2/28/75	70	Filed & ent. MOTION TO AMEND COMPLAINT IN INTERVENTION w/Proposed Amended Complaint in Intervention
	71	Fil. & ent. MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT IN INTERVENTION w/Cert. of Ser.
3/4/75	72	Filed & ent. MEMORANDUM OF AUTHORITIES ON THE

		ELEVENTH AMENDMENT BAR OF BACK WAGES filed by deft. w/Cert. of Ser.
3/6/75	73	Fil. w/Judge Dupree: MEMORANDUM OF AUTHORITIES ON WHETHER THE ELEVENTH AMENDMENT BARS BACK PAY IN THIS CASE filed by U.S.A. w/Cert. of Ser.
3/12/75	74	Fil. & ent. MOTION TO CERTIFY AS CLASS ACTION pursuant to R.23(c)(1), F.R.Civ.P. filed by plffs.
	75	Filed & ent. PLAINTIFF'S RESPONSE TO PLAINTIFF-INTERVENORS' MOTION TO AMEND COMPLAINT w/Cert. of Ser. jwt
3/20/75	76	Filed & ent. BRIEF IN OPPOSITION TO PLAINTIFF-INTERVENOR'S MOTION TO AMEND COMPLAINT IN INTERVENTION w/Cert. of Ser. (6 cys. to Atty. Manning. & cy. to J.Dupree by Mr. Manning) jwt
3/28/75		Filed & ent. REPLY TO PLAINTIFFS' MOTION TO CERTIFY AS CLASS ACTION w/Cert. of Ser. jwt
5/12/75	77	Calendared for hearing on all pending motions at Raleigh, Wed., 6/11/75 at 10:30 a.m. (Cy to counsel, Judges Butler & Dupree & Ct.Rptr.) jwt

6/16/75	78	Fil. & ent. SUPPLEMENTAL MEMORANDUM CONCERNING PENDING MOTIONS FOR LEAVE TO FILE AN AMENDED COMPLAINT IN INTERVENTION AND TO CERTIFY CASE AS A CLASS ACTION w/Cert. of Ser. jwt
1/23/76	79	NOTICE OF HEARING ON PENDING MOTIONS at 11:00 a.m., Fri., 2/13/76, Ctrm. #1, 7th Floor, Fed. Bldg., 310 New Bern Ave., Raleigh, N.C. (DUPREE, J.) Cy. to counsel, Clk. & Ct. Rptr. jwt
3/15/76		Filed & ent. TRANSCRIPT OF HEARING ON PENDING MOTIONS before Judge F. T. Dupree, Jr. Ctrm. #1, Fed. Bldg., Raleigh, N.C., on 2/13/76 at 11:00 a.m. jwt
9/13/76	80	Filed & ent. SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES w/attachments & Cert. of Ser. (Cy. furnished Judge by US) jwt
10/25/78	81	MOTION TO SUBSTITUTE COUNSEL – James V. Rowan, atty. for pltfs. moves for court order permitting substitution of Cressie Thigpen in his place. w/cs. lc: Judge Dupree
10/25/78	82	NOTICE OF APPEARANCE – by Cressie H. Thigpen, Jr. and Edward D. Reibman. w/cs lc: Judge Dupree.

11/16/78	83	ORDER—James V. Rowan is allowed to withdraw as counsel for pltfs. and Cressie Thigpen, Esq., Raleigh, N.C. is substituted as counsel in his stead. (Dupree, J) Civ. OB#47, P. 297. lc: counsel of record. (ent. 11/16/78)
11/17/78		PLAINTIFF-INTERVENOR'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMP in intervention w/attachments & w/cs.
12/13/78	85	PRE-TRIAL AND MOTION HEARING: (J. Dupree): 10:00 A.M. on Friday, December 29, 1978 at Courtroom No. 1, 7th Fl. 310 New Bern Ave., Raleigh, N.C. Cy to: Mr. Edward D. Reibman, Mr. Cressie H. Thigpen, Jr., Mr. Jerry E. Keith, Mr. Howard E. Manning and Mr. Millard R. Rich, Jr. trj
4/2/79		TRANSCRIPT OF HEARING ON MOTIONS AND PRE-TRIAL HEARING before Hon. Franklin T. Dupree, Jr., Raleigh, N.C., Fri., 12/29/78 at 10:00 a.m. (Pgs. 1-70—Ervin B. Bush, Ct. Rptr.)
6/4/79	86	MOTION TO RE-OPEN DISCOVERY by plff. Intervenor, U.S.A. w/cs jwt

6/20/79	87	DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENOR'S MOTION TO RE-OPEN DISCOVERY. w/cs jwt
6/22/79	88	MOTION TO RE-OPEN DISCOVERY – plffs. join plff.-intervenor's Motion to Re-Open Discovery
	89(2a)	MEMORANDUM IN SUPPORT OF MOTION TO RE-OPEN DISCOVERY. w/cs jwt
10/9/79	90	MEMORANDUM OF DECISION AND ORDER denying pltfs'. motion to dismiss the counterclaim; and allowing parties to & incl. 2/1/80 to complete discovery; also that class certification of the pltf. employee class is denied; pltf's. motion to certify the deft. class is denied for lack of subject matter jurisdiction; U.S. motion to amend intervention complaint is allowed insofar as it alleges racial discrimination but denies it insofar as it alleges sexual discrimination. (J.DUPREE) (Civ.O.B.#54,P.41) cc to counsel. pgn
10/19/79	91	MOTION FOR ENLARGEMENT OF TIME TO ANSWER OR OTHERWISE PLEAD TO AMENDED COMPLAINT. w/cs

10/22/79	92	ORDER extending time w/n which defts. may answer or otherwise plead to Amended Complaint in Intervention to & including 11/1/79. (DUPREE, J.) (Civ.O.B.#54,P.155) CC to counsel jwt
11/1/79	93	DEFENDANTS' ANSWER TO AMENDED COMPLAINT IN INTERVENTION—w/cs. sbd
	94	REQUEST FOR ENTRY OF DEFAULT AGAINST PLAINTIFF-INTERVENORS—w/cs. sbd
11/5/79	95	MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED, FILED AND ENTERED ON OCTOBER 9, 1979—w/cs.
	96	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED, FILED AND ENTERED ON OCTOBER 9, 1979—w/cs sbd
11/6/79	97	ENTRY OF DEFAULT—Entered agst. the plff-intervenors as provided by R. 55(a), F.R.Civ.P. (Clk. J. Rich Leonard) Civ.OB #54,p.276. cc to counsel. sd
11/19/79	98	DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISION AND

		ORDER DATED, FILED AND ENTERED ON OCTOBER 9, 1979 w/cs. sd
	99	AMENDMENT TO ANSWER TO AMENDED COMPLAINT IN INTERVENTION – w/cs.
11/16/79	100	MOTION TO SET ASIDE DEFAULT – Pur. to R. 55(c) & 60(b), F.R.C.P., plff-interv. move to set aside default entered on 11/6/79. w/cs. sd
	101(2a)	MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE DEFAULT – by plff-interv. sd
11/19/79	102	DEFENDANTS' RESPONSE TO PLFF-INTERVS' MOTION TO SET ASIDE DEFAULT – w/cs.
12/7/79	103	PLAINTIFF INTERVENORS' MOTION FOR LEAVE TO FILE OUT OF TIME – w/Proposed Answer & Memorandum. w/cs. sd
12/10/79	104(2b)	PLAINTIFFS' INTERROGATORIES – RE: MACHINE READABLE DATA w/cs jwt
12/14/79	105(2b)	DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET –
	106	DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENORS' MOTION FOR LEAVE TO FILE OUT OF TIME – w/cs. s d
1/4/80	107(2b)	PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S JOINT INTERROGATORIES TO DEFTS. w/cs. pg

1/8/80	108	MOTION FOR A PROTECTIVE ORDER PUR. TO R.26(c) of F.R.Civ.P. – by defts.
	109(2b)	DEFTS' ANSWERS TO PLFFS' INTERROGATORIES RE: MACHINE READABLE DATE – w/cs.
1/10/80	110(2)	MOTION TO ENLARGE TIME FOR DISCOVERY – by USA, to 6/2/80.
	111(2a)	MEMORANDUM OF PLFF-INTERV. U.S. IN SUPPORT OF ITS MOTION TO ENLARGE THE TIME FOR DISCOVERY w/cs.
1/11/80	112	ORDER – on motion by defts., depositions noticed for 1/14/80 be postponed until plffs & plff-interv. have responded to defts' motion. (HOWELL, U.S.M.) cc to counsel. (Ent. 1/11/80)
	113	JOINT NOTICE OF TAKING DEPOSITIONS – Plffs. & Plff-Interv. will jointly take depositions of listed people. w/cs. sd
1/14/80	114(2b)	MOTION FOR EXTENSION OF TIME WITHIN WHICH TO ANSWER INTERROGATORIES – Plffs. request an additional 30 days w/in which to answer. w/cs. sd
1/23/80	115	(Red Jacket) Plaintiffs' ANSWERS TO INTERROGATORIES – FIRST SET: for following Plffs: Richard M. Edwards, Chester L. Bright, Pennie P. Battle, W.E. Wright, Booker T. McNeill, Percy W.

		Williams, Clifton M. Grimes, Haywood E. Harrell, James E. Wright, Minnie B. Taylor, Johnnie Jones, III, Mary C. Martin, Chester Stocks, W.N. Payton, Jr., Fletcher Barber. w/cs
1/25/80	116(2a)	MEMORANDUM IN SUPPORT OF PLFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED, FILED AND ENTERED ON October 9, 1979. w/cs.
	117	(Red Jacket) PLAINTIFFS' ANSWERS TO INTERROGATORIES – FIRST SET – For following Plffs: George W. Koonce, Natalie S. Wimberly, Luther D. Baldwin, Earl G. Swann, Plese Corbett, Martha B. Thomas, Jeanette B. Sherrod, Margaret L. Baldwin, Calvin Hargrove, Jr., Albrey Lee Jones, P.E. Bazemore.
1/28/80	118	PLFFS' REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – w/cs.
	119	(Red Jacket) PLFFS' ANSWERS TO INTERROGATORIES – FIRST SET for Avant P. Coleman, Margaret J. Woods, Henry Revell, Jr., Fred Belfield, Jr., Victoria B. Bynum, Annie P. Costen Gilmer, w/cs.

1/31/80	120	PLAINTIFF-INTERVENORS' RESPONSE TO MOTION OF DEFTS' FOR PROTECTIVE ORDER – w/cs.
2/14/80	121(2b)	MOTION TO COMPEL ANSWERS TO DEFTS' INTERROGATORIES DIRECTED TO PLFFS – w/cs.
2/19/80	122	MEMORANDUM – Defts. motion for a protective order is deferred at least until plffs. have responded to motion to compel. (HOWELL, U.S.M. (Civ.OB#56, p.193) cc to counsel. sd
2/29/80	123	PLAINTIFFS' RESPONSE TO DEFTS' MOTION TO COMPEL ANSWERS TO DEFTS' INTERROGATORIES DIRECTED TO PLFFS – w/cs. cy. to Howell
2/29/80	124	PLAINTIFFS' ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLFF – FIRST SET – for (Red Jacket) Riddick Earl Wilkins, Leonard C. Cooper, Bertha Bethel Forte, Alma C. Hobbs, Hernando F. Palmer, w/cs.
3/17/80	125	PLAINTIFFS' ANSWERS TO DEFTS' INTERROGATORIES TO PLFF. – FIRST SET – for (Red Jacket) Geraldine H. Ray, Clifton Parker, Marilyn White Rich, Esther B. Winston. sd

4/1/80	126	PLAINTIFFS ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for (Red Jacket) David B. Waymer. cgh
11/19/80		Scheduled for a motion hearing at 10:15 a.m. on 12/1/80 before Magistrate Howell in Raleigh, N.C. cgn
11/24/80		Cont'd. to 12/15/80 at 4:15 P.M. before Howell in Raleigh – jwt
12/5/80	127(b)	PLAINTIFF'S ANSWER TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Inez Foster. mk
	128(b)	PLAINTIFF'S ANSWERS TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Louise Penn Slade. mk
	129(b)	PLAINTIFF'S ANSWERS TO DEFTS' INTERROGATORIES TO PLFTS – FIRST SET – for George E. McDaniel. mk
	130(b)	PLAINTIFF's ANSWERS TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Carrie Lindsey Thompson. mk
	131(b)	PLAINTIFF'S ANSWERS TO DEFTS' INTERROGATORIES TO PLTFS – FIRST SET – for Robert Lee Lancaster. mk
12/19/80	132	PLAINTIFF-INTERVENORS' RESPONSE TO ADDITIONAL MEMORANDUM IN

SUPPORT OF *MOTION FOR PROTECTIVE ORDER* – w/cs. mvk

1/15/81 133(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Ernest C. Short – w/cs. tt

134(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Slayter T. Lloyd – w/cs. tt

135(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Mary Irene Parham – w/cs. tt

136(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Jo Ann Fleming Carter – w/cs. tt

137(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Judy Herring Wallace – w/cs. tt

138(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for William C. Stroud – w/cs. tt

139(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTER-

ROGATORIES TO PLAINTIFFS – FIRST SET – for Leroy James – w/cs. tt

140(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Iley Wiley Murfree – w/cs. tt

141(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Dorothy M. Hearne – w/cs. tt

142(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Mary B. Crawford – w/cs. tt

143(b) PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES TO PLAINTIFFS – FIRST SET – for Lloyd L. Peace – w/cs. tt

RECEIVED ON 3/17/81 – RESPONSE OF ESTHER B. ROSCOE WINSTON in addition to her Answer to Interrogatories (#125, filed 3/17/80). mk

RECEIVED ON 3/6/81 – RESPONSE OF ROBERT LANCASTER in addition to his Answer to Interrogatories (#131, filed 12/5/80). mk

		RECEIVED ON 3/6/81 – RESPONSE OF CARRIE THOMPSON in addition to her Answer to Interrogatories (#130, filed 12/5/80). mk
		RECEIVED ON 3/6/81 – RESPONSE OF HAYWOOD HARRELL in addition to his Answer to Interrogatories (#124, filed 2/29/80). mk
		RECEIVED ON 3/6/81 – RESPONSE OF LEONARD COOPER in addition to his Answer to Interrogatories (#124, filed 2/29/80). mk
5/5/81		Letter from Clerk to counsel of record asking for a stip. on discovery. If they cannot agree, a status conference will be scheduled for the week of June 1, before Magistrate McCotter. cgh
6/2/81	144	ORDER – Upon consent of the parties, the discovery period in this action will conclude on October 30, 1981, w/ a final pretrial conference and trial to be scheduled thereafter as the docket permits. (CIV. O.B. #62, p. 208) (LEONARD, clerk) – cc to counsel. mk
6/19/81		ISSUED NOTICE OF HEARING ON PENDING MOTIONS at 10.00 a.m.. Fri., 7/17/81 in Raleigh in Ctrm. #1, 7th Floor, P.O. & Cthse. before Judge Dupree.

*Entries #127-131 and 133-143 in separate folders

6/30/81		ISSUED NOTICE OF NON-JURY TRIAL Mon., 12/7/81 at 10:00 a.m., Raleigh, NC, Ctrm. #1, before Judge Dupree. jwt
7/15/81	145(3a)	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE DEFAULT AND MOTION TO FILE OUT OF TIME. w/cs & attachment (Cy. to J. Dupree) jwt
7/24/81	146(3a)	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISON AND ORDER DATED, FILED AND ENTERED ON 10/9/79 – concludes that pltfs' request that they be certifed as representatives of the class consisting of all black professional employees of the NCAES since 11/18/71 be granted – w/cs and attachments. tt
*7/15/81	147(3a)	SUPPLEMENTAL MEMORADUM IN SUPPORT OF PLAINTIFFS' MOTION TO RECONSIDER MEMORANDUM OF DECISION AND ORDER DATED OCTOBER 9, 1979 – pltfs request they be certified as representatives of the class consisting of all black employees of the NCAES since 11/18/71 and thereafter – w/attachments. tt

7/27/81	148(3a)	DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER THE DENIAL OF CLASS ACTION STATUS BY ORDER OF OCTOBER 9, 1979—defts. respect. submit that this action not be certified as a class action, and that the Court's Order of 10/9/79 w/respect to class certification remain in effect—w/cs. tt
7/29/81		AFFIDAVIT OF HERNANDO PALMER—to be attached to Pflt's Supp. Memo. in Support of Pltfs' Motion to Reconsider Memo. of Decision & Order, Filed and Entered on 10/9/79 filed 7/24/81 tt
7/29/81	149	ORDER—The Court makes the following rulings on various pending motions heard on July 17, 1981: Plft's motion to reconsider the Court's order of Oct. 9, 1981: Pltf's motion to reconsider the Court's order of Oct. 9, 1979 denying the motion for certification of a pltf & deft. class under Rule 23 of the F.R.C.P. is denied for the reasons set forth in the court's order of Oct. 9, 1979; the motion of pltf-intervenors to set aside the default entered against them on

		Nov. 6, 1979, is allowed; the deft's motion for a protective order, filed on January 8, 1980, is denied; deft's motion to compel, filed on Feb. 14, 1980, is allowed & pltfs are directed to continue their efforts to complete their answers to defts' interrogatories. (CIV. O.B. #63, p. 10) (DUPREE, J.)—cc to counsel. mk
8/12/81		DEPOSITION OF DR. CHESTER D. BLACK—taken 7/7/81 at 10:00 a.m. in Raleigh, N.C. tt
		DEPOSITION OF DR. THOMAS C. BLALOCK—taken 7/7/81 at 3:30 p.m. in Raleigh, N.C. tt
8/24/81	150	SUGGESTION FOR SUBSTITUTION OF PUBLIC OFFICIALS—by pltf.-intervenor—w/cs. tt
8/27/81	151(3b)	ANSWERS TO PLAINTIFFS' AND PLAINTIFF-INTERVENORS' JOINT INTERROGATORIES TO DEFENDANTS—w/cs & attachments (attachments in separate folder)
9/10/81	152(3b)	DEFENDANTS' INTERR. DIRECTED TO PLAINTIFF-INTERVENORS U.S.A.—w/cs. tt
9/21/81		ISSUED NOTICE OF FINAL PRE-TRIAL CONFERENCE before USM McCotter, in Raleigh, Mon., 11/2/81, USM Ctrm., 6th Floor, Cthse., 310

		New Bern Ave., at 10:15 A.M. jwt
9/24/81		Calendared for Non-jury trial in Raleigh, Ctrm. #1, before Judge Dupree. jwt
9/29/81	153(3a)	DEFENDANTS' SECOND SET OF INTERROGATORIES DIRECTED TO PLAINTIFF-INTERVENORS UNITED STATES OF AMERICA – w/cs. tt
10/6/81		Case file to J. Dupree, w/request for handling of dispositive motion (Request for Substitution of Public Officials by pltf.-intervenor).
10/8/81	154	ORDER – John R. Block as Sec. of Agriculture is to be substituted as pltf.-intervenor herein in place of Earl L. Butz, one of pltf.-intervenors of record, & Dr. Mary Nell Greenwood as Deputy Director, Science & Ed. Administration-Extension is to be substituted as pltf-intervenor herein in place of Gene N. Lear, one of pltf.-intervenors of record – (DUPREE, J.) (CIV. O.B. #63, p. 199) cc counsel tt
	155	ORDER RELATING TO DISCOVERY MATTERS AND FINAL PRE-TRIAL CONFERENCE – pltf.-intervenor, U.S., shall have until 11/2/81 in which to file & deliver to defts. & pltf. answers to defts' interr.; time in which defts. may engage

		in discovery shall be extended through 11/16/81 provided that depos will be completed by 11/16/81, defts. will submit any add. written discovery to pltf.-intervenors by Express Mail or Fed. Express on or before 11/5/81, & pltf-intervenors will cooperate in making individuals available for depos during that period through 11/16/81; pltf.-intervenors will submit answers to any add. written discovery filed by defts. by Express Mail or Fed. Express mailed on or before 11/19/81 provided such answers can be obtained through reasonable efforts; & Final Pre-Trial Conference will be rescheduled from 11/2/81 until 11/23/81 at 10:00 a.m.—signed by counsel—(LEONARD, M.) (CIV. O.B. #63, p. 201) cc counsel tt
10/12/81		ISSUED NOTICE RESCHEDULING FINAL PRE-TRIAL at Raleigh, Mon., 11/23/81 at 10:00 am before USM Leonard in USM Ctrm., 6th Floor, Cthse. jwt
*9/25/81	153a(3a)	PLAINTIFFS' INTERROGATORIES TO DEFENDANTS for the following Plaintiffs: RICHARD M. EDWARDS, CHESTER L. BRIGHT, PENNIE P. BATTLE, W. E. WRIGHT, BOOKER T.

McNEILL, PERCY W. WILLIAMS, CLIFTON M. GRIMES, HAYWOOD E. HARRELL, JAMES E. WRIGHT, MINNIE B. TAYLOR, JOHNNIE JONES III, MARY C. MARTIN, CHESTER STOCKS, W. N. PAYTON, JR., FLETCHER BARBER, ALMA C. HOBBS, LEONARD C. COOPER, HOOVER ROYALS, JUDY HERRING WALLACE, JOANN F. CARTER, MARY B. CRAWFORD, GEORGE W. KOONCE, NATALIE S. WIMBERLY, LUTHER D. BALDWIN, EARL G. SWANN, PLESE CORBETT, MARTHA B. THOMAS, JEANNETE B. SHERROD, MARGARET L. BALDWIN, CALVIN HARGROVE, JR., ALBREY LEE JONES, P. E. BAZEMORE, MARGARET J. VOODS, AVANT P. COLEMAN, HENRY REVELL, JR., FRED BELFIELD, JR., VICTORIA B. BYNUM, ANNIE P. COSTEN GILMER, J. M. SPAULDING, MARY I. PARHAM, SLAYTER T. LLOYD, LEROY JAMES, RIDDICK E. WILKINS, BERTHA B. FORTE, HERNANDO PALMER, GERALDINE H.

		RAY, CLIFTON PARKER, MARILYN W. RICH, ESTHER B. WINSTON, DAVID B. WAYMER, ROBERT L. LANCASTER, INEZ W. FOSTER, GEORGE E. McDANIEL, CARRIE L. THOMPSON, LOUISE P. SLADE, ILEY W. MURFEE, LLOYD L. PEACE, DOROTHY M. HEARNE, ROOSEVELL LAWRENCE, WARREN BARNES, ERNEST C. SHORT & WILLIAM C. STROUD—w/cs. tt
10/14/81	156(3a)	PLAINTIFF-INTERVENOR UNITED STATES' INTERROGATORIES TO DEFENDANTS THIRD SET—w/cs. t
10/20/81	157	*MOTION FOR ORDER TO COMPEL DISCOVERY*—pltf.-intervenor U.S.A. moves the Court to order defts.' agent Z. Harrell, Co. Extension Chrmn. in Gates Co., N.C. to respond to questions on oral depo re his knowledge of events which culminated in M. Woods' grievance hearing on 11/16/77; & to order defts.' agents, in course of depos, to respond to questions re their knowledge of practices which are alleged to discriminate or to have discriminated on the basis of race—w/cs. tt

10/20/81	158(3b)	MEMORANDUM IN SUPPORT OF MOTION FOR ORDER TO COMPEL DISCOVERY – by pltf.-intervenor – w/cs. tt
10/21/81	159	DEFTS' RESPONSE TO MOTION TO COMPEL DISCOVERY – w/cs & attachments. cgh
	160(3a)	Objections & Answers to Interr. Submitted by Pltfs. to Defts. by Letter of Sept. 24, 1981 – w/cs & attachments
*10/23/81	161	MOTION by deft. for an order prohibiting all further interviews of employees of deft. NCAES without the knowledge of defts.; notification of employees already interviewed; copies of all statements obtained; no evidence obtained by means of such interviews be used as evidence at the trial of this action; . . . – w/cs. cgh
		Letter from Fed. Government's counsel correcting Para. #4 of interr. mailed on 10/14/81. cgh
10/26/81	162	ORDER – pltf.-inter.' motion to compel is denied. Pltf.-Inter.'s mot. to compel deponet Harrell to ans. the propounded questions is allowed. By 11/3/81, counsel for pltfs. are to examine the existing employee list in pltf.-inter. possession. Counsel for pltfs. are then to examine the

		discovery files of pltf.-inter. to discover whether the personnel record have already be produced. If records of relevant employees are not available to pltf., pltfs. may file a request for production of docu. requiring defts to produce the personnel records of these employees for copying at pltfs' expense. Such request should be filed no later than 11/6/81. Records should be produced at a mutually convenient time prior to 11/11/81. Failure of pltfs. to comply with this timetable will preclude any further discovery in this area. (CIV O.B. #63, p. 256) (LEONARD, U.S.M.) CC to counsel. cgh
10/27/81	163	MOT. FOR SEPARATE TRIAL OF THE ISSUES OF LIABILITY & PROSPECTIVE RELIEF FROM THOSE OF INDIVIDUAL RELIEF BY pltf.-inter.— w/cs. cgh
	164(3b)	MEMO. IN SUPPORT OF MOT. TO SEPARATE THE ISSUES OF LIABILITY & PROSPECTIVE RELIEF FROM THAT OF INDIVIDUAL RELIEF— w/cs. cgh
*10/23/81		ISSUED NOTICE OF HEARING ON MOTION FOR PROTECTIVE ORDER at 1:00 p.m.,

		Wed., 10/28/81 in Raleigh, USM Ctrm., 6th Floor, PO & Cthse., before USM Leonard.
10/27/81		Hearing changed to Thurs., 10/29/81 at 11:00 a.m., before Judge Dupree in Ctrm. No. 1. jwt
10/28/81	165(3b)	MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION REGARDING INTERVIEWS WITH NCAES EMPLOYEES w/attachments & cs (Cy. to J. Dupree) jwt
10/29/81	166	FACTUAL BACKGROUND IN DISCOVERY SINCE THE COURT'S ORDER OF 10/9/81 by deft. Motion hearing held before J. Dupree in Raleigh. Edward D. Riebman, Cressie H. Thigpen, Jr., Squire Padgett & Burton Craige for pltfs; Howard E. Manning, Sr. & Howard E. Manning, Jr. for defts. Plfts. were directed to give the defts. a list of the persons interviewed by the FBI & to ans. interr. by 11/2/81. Judge to decide on the bifarcation issue shortly.
	167	ORDER – pltfs. to provide counsel for deft. names of all persons in employment of defts. who have been interviewed or are to be interviewed by agents of FBI re this action; pltfs, are not required to disclose to defts.' counsel statements of info ob-

tained by FBI agents from defts.' employees, but pltfs. are required to answer the outstanding interr. previously served upon them by defts. on or before 11/2/81; defts.' motion to disqualify opposing counsel was w/drawn; this order is w/out prejudice to defts.' right to move to reopen their motion w/respect to any person whose name appears on the list of person furnished defense counsel today who is alleged to have been improperly interviewed because of his or her position in the employment of defts.; the court will consider pltfs.' motion to bifurcate the scheduled trial of this action on 12/7/81 & enter a ruling thereon w/out further argument unless it is determined that a more detailed written response by defts. to the motion will be necessary prior to decision—(Dupree, J.) (CIV O.B. #63, p. 266) cc counsel tt

11/2/81 168 ORDER—upon motion of plff.-intervernor, U.S.A., for separate trial of the issue of liability & prospective relief from those of individual relief filed 10/27/81, the court being of opinion that the interests of judicial economy will not be

		served by such separation, it is Ordered that the motion be and the same is hereby denied. (Dupree, J.) (Civ. OB #63, p. 273) cc to counsel. sm
11/2/81	169	Rec'd copy of MOTION TO SHORTERN TIME FOR DEFTS. TO RESPOND TO PLFF.-INTERVENOR'S
11/4/81	169a	(FILED) REQUEST TO ADMIT OR IN THE ALTERNATIVE INTERROGATORIES – FOURTH SET
	170	Rec'd copy of MEMORANDUM IN SUPPORT OF MOTION TO SHORTEN TIME FOR DEFTS. TO RESPOND TO PLFF.-INTERVENOR'S REQUEST TO ADMIT OR IN THE ALTERNATIVE INTERROGATORIES FOURTH SET
	171(3a)	FIRST REQUEST OF UNITED STATES OF AMERICA, PLAINTIFF-INTERVENORS, FOR THE ADMISSION OF MATTERS BY THE DEFENDANTS, WILLIAM C. FRIDAY, ET AL, OR IN THE ALTERNATIVE INTERROGATORIES-FOURTH SET APPENDIX A-E (Red Jacket)
	172	DEFTS.' RESPONSE TO U.S. MOTION FOR SEPARATE TRIAL OF ISSUES OF LIABILITY AND PROSPEC-

		TIVE RELIEF FROM THOSE OF INDIVIDUAL RELIEF (Cy. to Judge by Atty. Manning.)
	173	DEFTS.' RESPONSE TO U.S. MOTION TO SHORTEN TIME IN WHICH DEFTS. HAVE TO RESPOND TO REQUESTS FOR ADMISSION OR IN THE ALTERNATIVE INTERROGATORIES – FOURTH SET AND OBJECTIONS, RESPONSE TO PLAINTIFFS' MOTION TO ENLARGE TIME FOR DISCOVERY AND MOTION FOR A PROTECTIVE ORDER (Cy. to J. Dupree by Atty. Manning) jwt
11/3/81	174(3a)	PLAINTIFF-INTERVENOR'S ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANTS, William C. Friday, et al. – w/cs. cy. J. Dupree tt
	175	PLTFS' RESPONSE TO MOTION FOR SEPARATE TRIAL OF THE ISSUES OF LIABILITY AND PROSPECTIVE RELIEF FROM THOSE OF INDIVIDUAL RELIEF AND CLARIFICATION OF PLTFS' POSITION – w/cs. cy. J. Dupree tt

	176	*MOTION TO ENLARGE TIME FOR DISCOVERY*—pltfs. request that discovery time for pltfs. be extended to 11/16/81—w/cs. cy J. Dupree tt
	177	*MOTION TO COMPEL ANSWERS TO DEFTS' INTERR. DIRECTED TO U.S.A., 1ST AND 2ND SETS, MOTION FOR SANCTIONS*—deft. pray for an Order directing the U.S. to fully & completely answer outstanding interr. immediately; & for such other & further relief & sanctions as may be imposed pursuant to Rule 37, F.R.Civ.P.—w/cs & attach. cy. J. Dupree tt
	178	ORDER—defts' motion for a protective order relieving them of the necessity of responding to pltfs' last-minute-discovery is allowed & pltfs' motion to enlarge the time for completing discovery, filed since the dictation of this Order began, is denied—(DUPREE, J.) (CIV O.B. #63, p. 286) cc counsel tt
11/5/81	179(3a)	DEFENDANTS' INTERROGATORIES DIRECTED TO THE U.S.—3RD SET AND REQUESTS FOR ADMISSIONS—w/cs. tt
11/6/81	180	*PLAINTIFF-INTERVENORS' MOTION FOR LEAVE TO FILE OUT OF TIME*—pltf-intervenors' request leave of this

		Court to file out of time the attached Response to Defts.' Interr. – w/proposed Order. cy. J. Dupree tt
	181(3b)	PLAINTIFF-INTERVENORS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL AND IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE OUT OF TIME AND MOTION FOR SANCTIONS – w/cs. cy. J. Dupree tt
11/6/81	182(3a)	REQUEST FOR PRODUCTION OF DOCUMENTS – w/cs. mk
11/10/81	183	MOTION TO RECONSIDER ORDER GRANTING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – by U.S.A. – w/cs. Cy. to J. Dupree. cgh
	184(3b)	MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER GRANTING DEFTS' MOTION FOR A PROTECTIVE ORDER by U.S.A. – w/cs. Cy. to J. Dupree. cgh
11/12/81	185	DEFENDANTS' RESPONSE TO MOTION TO RECONSIDER DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – w/cs & attach. cy. J. Dupree tt

	186	ORDER – motion to compel answers to interr. 1-12 & 85-88 is denied w/out prejudice to defts' right to renew the motion for sanctions should the info be later found in a form that the U.S. should have uncovered w/reasonable diligence; pltf-intervenor is directed to obtain & produce for defts. whatever documents re number of black employees w/particular degree for a particular year on or before 11/17/81; pltf-intervenors are directed to respond to interr. 17-38, 39-52 & 67-80 as propounded & w/specificity on or before 11/18/81; pltf-intervenor is directed to answer interr. 81-84 on or before 11/18/81; this case remains on the 11/23/81 pre-trial calendar & the 12/7/81 trial calendar – (LEONARD, M.) (CIV O.B. #63, p. 305) cc counsel tt
11/13/81	187	DEFENDANTS' OBJECTIONS TO PLAINTIFF-INTERVENORS UNITED STATES' INTERROGATORIES TO DEFENDANTS' – THIRD SET, MOTION FOR A PROTECTIVE ORDER – defts. prays for a Protective Order permitting defts. not to answer the third set of interr. from the U.S. – w/cs. tt

	188	ORDER – pltfs' motion to reconsider order granting defts' motion for protective order filed 11/10/81 is denied – (DUPREE, J.) (CIV O.B. #63, p. 309) cc counsel tt
11/17/81	189(3b)	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER GRANTING DEFENDANTS' MOTION FOR PROTECTIVE ORDER – by pltf-intervenors – w/cs & attach. tt
	190(3b)	MEMORANDUM IN RESPONSE TO DEFENDANTS' OBJECTIONS TO THE UNITED STATES' THIRD SET OF INTERROGATORIES AND IN RESPONSE TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER – by pltf.-intervenors – w/cs & attach. tt
	191	ORDER – pltfs.' motion to compel production of the approximately 350 personnel data cards is denied; defts. not having objected to production of the 31 personnel records sought, that issue is now moot – (LEONARD M.) (CIV O.B. #63, p. 318) cc counsel tt
		Memo to Counsel of Record advising that Judge Dupree will conduct the final pre-trial conference on 11/23/81 in Ctrm. #1 at time scheduled. tt

11/17/81	192(3a)	PLAINTIFF-INTERVENOR'S ANSWERS TO DEFENDANTS' INTERROGATORIES THIRD SET AND ANSWERS TO REQUESTS FOR ADMISSIONS – w/cs. tt
	193(3a)	PLAINTIFF-INTERVENOR'S SUPPLEMENTAL ANSWERS (PART I) TO INTERROGATORIES PROPOUNDED BY DEFENDANTS, WILLIAM C. FRIDAY, ET AL. – w/attach. (2 & 3 in separate folder) & cs. tt
11/19/81	194(3a)	PLAINTIFF-INTERVENOR'S SUPPLEMENTAL ANSWERS (PART II) TO INTERROGATORIES PROPOUNDED BY DEFENDANTS, WILLIAM C. FRIDAY, ET AL. – w/cs & attach. tt
	195	ORDER – defts.' motion for a protective order permitting defts. not to answer the 3rd set of interr. from the U.S. is allowed – (DUPREE, J.) (CIV O.B. #63, p. 323) cc counsel
11/20/81	196	*MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM* – by pltf. – intervenors John R. Block, Sec. of Agriculture & Mary Nell Greenwood, Administrator of the Federal Extension Service – w/cs. tt

	197(3b)	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM – by pltf. – intervenors – w/cs. tt (Joh R. Block, Sec. of Agriculture & M. N. Greenwood, Administrator of the Federal Extension Service)
11/20/81	198	*MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND MOTION FOR DISCOVERY SANCTIONS* – pltf. – intervenor U.S.A. moves the Court to compel defts. to answer U.S.' Interr. to Defts. 3rd Set, filed 10/14/81, before the final pre-trial conference scheduled for 11/23/81 – w/cs. tt
	199(3b)	MEMORANDUM IN SUPPORT OF MOTIONS TO COMPEL ANSWERS TO INTERROGATORIES AND FOR DISCOVERY SANCTIONS – by pltf. – intervenor U.S.A. – w/cs. tt
11/23/81		DEPOSITION OF EDWIN YANCY, SR. taken in Raleigh, N.C. on 10/30/81.
		DEPOSITION OF J. D. DODSON taken in Raleigh, N.C. on 10/30/81.
		DEPOSITION OF J. D. DODSON, PART II
		DEPOSITION OF PHIL HASS taken in Raleigh, N.C., on 10/22/81. Not original.

DEPOSITION OF EDGAR J. BOONE taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF DONALD L. STORMER taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF THOMAS C. BLALOCK taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF LEONARD RALPH SASSER taken in Raleigh, N.C., on 10/30/81.

DEPOSITION OF MARTHA RUTH JOHNSON taken in Raleigh, N.C., on 10/29/81.

DEPOSITION OF DR. DANIEL GODFREY taken in Raleigh, N.C., on 10/22/81.

DEPOSITION OF ZACKIE W. HARRELL taken on 10/15/81.

DEPOSITION OF ZACKIE W. HARRELL, PART II, taken in Raleigh, N.C., on 10/29/81.

DEPOSITION OF TALMADGE BAKER in Raleigh, N.C., on 10/22/81.

DEPOSITION OF DEWEY GILBERT HARWOOD, JR. taken on 10/9/81.

DEPOSITION OF JOSEPHINE PATTERSON taken on 10/9/81.

DEPOSITION OF JOHN RICHARDSON taken on 10/15/81.

DEPOSITION OF GEORGE W. O'NEAL taken on 10/15/81.

DEPOSITION OF CLYDE D. PEEDIN, SR., taken on 10/15/81.

DEPOSITION OF ELIZABETH MELDAU taken in Raleigh, N.C., on 10/30/81.

DEPOSITION OF HUGH LUPTON LINER taken on 10/16/81.

DEPOSITION OF HUGH LUPTON LINER, VOL. II, taken in Raleigh, N.C., on 10/23/81.

DEPOSITION OF DR. PAUL DEW taken on 10/16/81. cgh

200 DEFTS' RESPONSE TO U.S.' MOTION TO COMPEL ANS. TO INTERR. & MOT. FOR DISCOVERY SANCTIONS – w/cs.

201(3b) MEMO. IN SUPPORT OF MOTIONS FOR SANCTIONS BY defts. – w/cs.

202 DEFTS MOTION FOR SANCTIONS AGAINST THE UNITED STATES, RULE 37, F.R.Civ.P. – w/cs & attachments. cgh

203 MOTION FOR SUBSTITUTION OF PARTIES by pltfs. to substitute spouses of deceased pltfs. Cy. to opposing counsel in courtroom. (Filed in Open Court) 204 MOTION TO AMEND by pltfs. in Re: to pltfs. that have just gotten "Right to Sue" letters. Cy. to opposing counsel in courtroom. (Filed in Open Court.) W/attachments.

	205	AFFIDAVIT of Burton Craige re: the photocopying of Personnel Data cards. Cy. to opposing counsel in courtroom. (Filed in Open Court.)
	206(3b)	MEMORANDUM IN SUPPORT OF APPEAL by pltf.'s from Mag. Leonard's Order of 11/17/81. Cy. to opposing counsel in courtroom. (Filed in Open Court) cgh
		Motion hearing & Pre-Trial conference held before J. Dupree in Raleigh, N.C. Cressie Thigpen, Ed Reibman, Squire Padgett & Burton Craige for pltfs.: Howard Manning, Sr., Howard Manning, Jr., & Millard Rich for the defts. All motions must be filed by 11/25/81 at 5:00 p.m. & responses filed by 5:00 p.m. on 11/27/81. Final P/T to be at 10:00 a.m. on 11/30/81. ETT: 12 weeks. cgh.
11/23/81		Received from Atty. Craige a packet of info. containing date on current USDA employees by educational degree & race—responding in part to Mag. Leonard's Order of 11/12/81. cgh
11/24/81	207(46)	SUPPLEMENTAL MEMORANDUM IN SUPPORT OF APPEAL—pltfs. again request that they be permitted to copy said

		personal data cards prior to trial or, in the alt. subpoena them for use at trial – w/cs. cy. J. Dupree tt
11/25/81	208	MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DEFENDANT'S LIABILITY – by pltf.-intervenor U.S.A. – w/cs. tt
	209(4b)	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DEFENDANTS' LIABILITY – by pltf.-intervenor U.S.A. – w/cs. tt
11/27/81	210	MOTION FOR SUBSTITUTION OF PARTIES – Thelma Groves Turner for pltf. J.S. Turner, deceased – w/cs. cgh
	211	DEFTS' RESPONSE TO THE U.S.'S MOTION FOR SUM. JUDG. ON THE ISSUE OF DEFTS' LIABILITY asking that it be denied – w/cs & affidavit of Thomas Carlton Blalock & Francis Giesbrecht. cgh
	212	DEFTS' RESPONSE TO THE U.S. MOTION FOR SUM. JUDG. ON THE ISSUE OF DEFTS' COUNTERCLAIM AGAINST THE USDA & FOR INJUNCTIVE RELIEF – w/cs & attachments. cgh
	213(4b)	PLTF. – INTERVENORS MEMO. IN OPPOSITION TO DEFTS' MOTION FOR SANCTIONS – w/cs.

11/30/81	214	DEFTS' TRIAL MEMO. PUR. TO LOCAL RULE 26.04 EDNC – w/cs. cgh
	215	DEFTS' PRE-TRIAL FINDING OF FACT & CONCLUSIONS OF LAW LOCAL RULE 26.07, EDNC – w/cs. cgh
		Final P/T Conference held before J. Dupree in Raleigh, N.C. Edward D. Reibman, Cressie Thigpen, Jr., Squire Padgett & Burton Craige for pltfs.: Howard Manning, Sr. & Howard Manning, Jr. for defts. Pltfs' mot. to amend re: Title VII claims is allowed. Pltfs' mot. for substitution of parties is allowed. Mot. for sum. judg. on counterclaim is denied. Mot. for sum. judg. on defts' liabilities is denied. Defts' mot. for sanctions is denied. Mag. Leonard's ruling is affirmed. cgh
	216	PLTFS' AMENDED COMPLAINT – pltfs. pray that defts. are enjoined from failing to provide services to minorities equal to those they provide to whites; maintaining segregated 4-H Clubs & Ext. Homemaker Clubs; providing services to 4-H Clubs, Ext. Homemaker Clubs, farmers, etc. on a segregated basis; & engaging in any discriminatory employment practice based on race or national origin. They ask for a

recruitment program, establishment of valid qualifications, hiring of minorities, promoting of minorities; providing monetary compensation to minorities for losses & backpay w/cs. cgh

	217	MEMORANDUM OF PRE-TRIAL COMPLIANCE – w/exhibit list, witnesses, contentions, stipulations, ETT: 12 weeks. cgh
	218	PLTF.-INTERVENORS' OBJECTIONS TO DEFTS' EXHIBITS No. 76, 175, 67(1)-(100). cgh
	219	PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW by pltf. – intervenors' – w/cs. cgh
12/3/81	220	DEFTS' ANSWER TO PLTF'S AMENDED COMPLAINT – praying action be dismissed & costs taxed to pltfs. – w/cs. cgh
12/4/81	221	PLTF'S RESPONSE TO DEFTS' OBJECTIONS TO EXHIBITS – pltfs. request objections be denied – w/cs.
	222	PLTF.-INTERVENORS' RESPONSE TO DEFTS' OBJECTIONS TO EXHIBITS – requesting objections be denied – w/cs. cgh
12/7/81	223	MOTION TO PRODUCE SOURCE DATE OF DEFTS' EXHIBITS 67(1)-(100)-w/affidavit of Doris M. Fuller. cgh

12/17/81	TRANSCRIPT of Non-jury trial, Mon., 12/7/81, before J. Dupree in Raleigh, N.C. Volume I, pages 1-191. cgh
12/21/81	TRANSCRIPT of Non-Jury Trial, Wed., 12/9/81, before J. Dupree in Raleigh, N.C., Volume III, pages 444-672. cgh
12/28/81	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/8/81 – Vol. 2.
	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 12/10/81 – Vol. 4.
*12/29/81	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 12/14/81 – Vol. 5.
1/4/82	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/15/81 – Vol. 6.
	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 12/16/81 – Vol. 7.
	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 12/17/81 – Vol. 8.
	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri. 12/18/81 – Vol. 9.
	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 12/21/81 – Vol. 10.
1/7/82	TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/22/81 – Vol. 11.

		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 12/23/81 – Vol. 12.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 12/28/81 – Vol. 13.
1/11/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 12/29/81 – Vol. 14.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 12/30/81 – Vol. 15.
1/12/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/5/82 – Vol. 17.
1/13/82	224	ORDER – all portions of transcript ordered by & delivered to the parties during the course of the trial within 10 days from the date taken or ordered, the charge shall be $4.00/page, which amt. may be divided equally between the U.S. & defts. (CIV O.B. #64, p. 141) (DUPREE, J.) CC to counsel. cgh
1/19/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 1/4/82 – Vol. 16.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/6/82 – Vol. 18.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 1/7/82 – Vol. 19.

		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri., 1/8/82 – Vol. 20.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 1/11/82 – Vol. 21.
1/22/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/12/82 – Vol. 22
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/13/82 – Vol. 23.
1/26/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/19/82 – Vol. 24.
1/27/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/20/82 – Vol. 25.
*12/28/81	225	DEFTS' MOT. TO DISMISS CLAIMS OF CERTAIN INDIVIDUAL PLTFS. PUR. TO RULE 41(b) & RULE 37(b) – w/cs. (Filed in Open Court) cgh
1/29/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 1/21/82 – Vol. 26.
2/1/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri., 1/22/82 – Vol. 27.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Mon., 1/15/82 – Vol. 28.

2/2/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Tues., 1/26/82–Vol. 29.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Wed., 1/27/82–Vol. 30.
		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Thurs., 1/28/82–Vol. 31.
		Non-Jury Trial began on Mon. Dec. 12, 1981, before J. Dupree in Raleigh, N.C. Ed Reibman, Cressie Thigpen, Squire Padgett, & Burton Craige for the pltfs. Howard Manning, Sr. Howard Manning, Jr., Millard Rich, Jr. for the defts. 31 days for the trial. Final arguments to be heard on *2/12/82, at 10:00 a.m.* before J. Dupree. cgh
.....	FILE #5	.....
2/8/82	226	DEFTS' MOTION TO DISMISS CLAIMS OF CERTAIN INDIVIDUAL PLTFS. PUR. TO R. 41(b) & R. 37(b)–w/cs.
	227	DEFTS' PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW–w/cs.
2/8/82	228	DEFENDANTS' POST TRIAL MEMORANDUM–w/cs.
	229	PLAINTIFFS MEMORANDUM & PROPOSED CONCLUSIONS OF LAW & FACT–w/cs.

	230	POST TRIAL FINDINGS OF FACT, CONCLUSIONS OF LAW & PROPOSED DECREE OF UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR – w/cs.
2/11/82	231	PLAINTIFFS' RESPONSE TO DEFENDANTS' PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW – w/cs.
	232	DEFTS' PROPOSED FINDINGS OF FACT MARKED IN ACCORDANCE W/J. DUPREE'S INSTRUCTIONS w/cs – by Pltf. – intervenor.
File #6		File #5 to J. Dupree. Red folder. cgh
	233	MOTION FOR PRELIMINARY INJUNCTION by pltf. as to the filling of county ext. head in Hertford Co. – w/attachments & cs. cgh
2/19/82		TRANSCRIPT of trial before J. Dupree in Raleigh, N.C., on Fri., 2/12/82 – Vol. 32.
	234	APPENDICES TO PROPOSED DECREE, FILED ON FEB. 9, 1982 – w/cs & attachments.
	235	ERRATA LIST TO U.S.' PROPOSED FINDINGS OF FACT, FILED ON FEB. 9, 1982 & TO U.S.' MARKED COPY OF DEFTS' PROPOSED FINDINGS OF FACT, FILED ON 2/11/82 – w/cs.

	236	REPLY BRIEF to defts' asking to discard the expert's witness, Dr. Charles Mann, statistical records – w/cs. Cys. of entries 234, 235 & 236 to J. Dupree. cgh
3/2/82	237	DEFTS' RESPONSE TO PLTFS' MOT. FOR PRELIMINARY INJUNCTION – pltfs' mot. for prel. injunc. as to Hertford Co. should be denied – w/cs. cgh
3/5/82	238	MOTION FOR PRELIMINARY INJUNCTION by pltf. in re: to vacant position of Co. Ext. Chairman in Warren Co. – w/cs & attachment. cgh
3/26/82	239	DEFTS' RESPONSE TO PLTFS' MOTION FOR PRELIMINARY INJUNCTION asking for denial – w/cs & exhibit A, B & C. cgh
8/20/82	240	ORDER SUBSTITUTING PARTIES – Elizabeth Ivey, Administratrix of the Estate of D. O. Ivey, deceased; Eva L. Greene, Administratrix of the Estate of Cleo Rich Greene; & Thelma Graves Turner, Administratix of the Estate of J. A. Turner, are substituted as parties pltf. of the deceased pltfs. – (DUPREE, J.) (CIV O.B. #66, p. 195) cc counsel tt
	241	MEMORANDUM OF DECISION (CLASS-WIDE CLAIMS) – Court finds that while there was

ample evidence of disparate treatment of blacks by the Extension Service prior to enactment of the Civil Rights Act of 1964, since that time deft. has made conscientious & successful efforts to erradicate the effects of past discrimination, has at no time engaged in purposeful discrimination & pltfs. have fallen short of establishing a preponderance of the evidence that deft. has engaged in a pattern & practice of discrimination; order will enter dismissing the pattern & practice suit of the U.S. as pltf.-intervenor; the claims of the 45 individual pltfs. will be the subject of a separate memo. of decision & order—(DUPREE, J.) (CIV O.B. 66, p. 196) cc counsel tt

242 ORDER DISMISSING COUNTERCLAIM—USDA's mot. for sum. judg. on the counterclaim of the Extension Service is denied—(DUPREE, J.) (CIV O.B. #66, p. 197) cc counsel tt

243 ORDER OF DISMISSAL AS TO CERTAIN INDIVIDUAL CLAIMS—mot. of defts. to dismiss the individual claims of Henry Revell, Chester Stocks, E. C. Short, Calvin Hargrove, Robert Lee Lancaster, Clifton Parker, Dorothy M. Hearne,

Louise Penn Slade, Alma Hobbes, Inez Foster, George Koonce, Lloyd Peace, Marilyn Rich White, Mary Crawford, Elizabeth Ivey (Admin. of Estate of D. O. Ivey) & Essie Moore is allowed & the action as it relates to these named pltfs. is dismissed w/prejudice—(DUPREE, J.) (CIV O.B. #66, p. 198) cc counsel tt

8/20/82 244 JUDGMENT ON CLASS-WIDE CLAIMS—U.S. as pltf.-intervenor is not entitled to recover of the defts., or any of them, by reason of any matters alleged in the original complaint in intervention or the amend. complaint in intervention & that the action of the pltf.-intervenor be & is dismissed w/costs—(DUPREE, J.) (CIV O.B. #66, p. 199) cc counsel tt

245 ORDER DISMISSING ACTION AS TO INDIANS—insofar as the action undertakes to assert a cause of action on behalf of Indians, the same is dismissed—(DUPREE, J.) (CIV O.B. #66, p. 200) cc counsel tt

246 ORDER OVERRULING MOTION FOR PRELIMINARY INJUNCTION—mot. of pltfs. for a preliminary injunction filed 2/11/82 w/respect to the co. extension chairmanship in

Hertford Co., N.C. is overruled & dismissed as moot – (DUPREE, J.) (CIV O.B. #66, p. 201) cc counsel tt

247 ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION – WARREN COUNTY – pltfs.' mot. for preliminary injunction filed 3/5/82 w/re to vacant position of co. ext. chairman in Warren Co. is denied but w/out prejudice to such rights as George Koonce may have, or claim to have, w/respect to the failure of defts. to recommend him for appointment as co. ext. chairman to fill vacancy created by retirement of L. C. Cooper – (DUPREE, J.) (CIV O.B. #66, p. 202) cc counsel tt

9/14/82 248 NOTICE OF APPEAL – by pltfs. W/CS. Filed copy to counsel, Judge Dupree, Court of Appeals including CC of index, transmittal letter. Copy of order appealed from to Court of Appeals. keb

9/17/82 249 MEMORANDUM OF DECISION (INDIVIDUAL CLAIMS) – judg. to be entered dismissing the individual claims as the Ext. Service endeavored to comply with the law. (DUPREE, J.) (CIV O.B. #67, p. 34) CC to counsel. cgw

	250	JUDGMENT – this action is dismissed as to all individual pltfs. Each side will bear its own costs. (CIV O.B. #67, p. 35) (DUPREE, J.) (ENT. 9/17/82) CC to counsel.
9/29/82	251	NOTICE OF APPEAL – each of the above named plaintiffs appeal to the U.S. Court of Appeals for the Fourth Circuit from the Judgment and Memorandum of Decision (Individual Claims) entered in this action on the 17th day of September, 1982. W/CS. Filed copy to Counsel, Judge Dupree and Court of appeals with CC of index and transmittal letter. keb
10/7/82	252	DESIGNATION OF RECORD ON APPEAL – by defendants. W/CS. keb
10/19/82	253	DEFENDANTS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES – by defts. W/CS. keb
	254	AFFIDAVIT OF HOWARD MANNING, Sr. in support of defts. W/CS. keb
	255(4b)	MEMORANDUM IN SUPPORT OF MOTION FOR AND AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES – by defts. W/CS. keb
10/19/82	256	NOTICE OF APPEAL – by U.S.A., plaintiff intervenor.

		W/CS. Filed copy to the Court of Appeals with transmittal letter and CC of Index. Copies to counsel. (entered 10/21/82) keb
10/20/82	257	DESIGNATION OF RECORD—by Edward Reibman, atty for pltfs. W/CS. keb
10/27/82	258	DESIGNATION OF RECORD—by USA W/CS. keb
11/8/82		Mailed record on appeal to the U.S. Court of Appeals including Volumes I thru XVII—pleadings, XVIII and XIX—memoranda, XXXIV thru XLIII—transcripts, with cc of index and transmittal letter. Copies to counsel. Volumes XX thru XXXIII (exhibits) to be forwarded by counsel. keb
11/8/82	259	MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR AND AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES—by USA. W/CS. keb
11/15/82	260	NOTICE OF APPEAL—by USA from the September 17, 1982 order. Filed copies to counsel, Judge Dupree, and 4th Circuit with transmittal letter.
12/2/82	261	PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR AN AWARD OF ATTORNEY FEES, COSTS, AND EXPENSES—by pltfs. W/CS. keb

12/8/82	262	ORDER – the ruling on defendant's motion for attorneys' fees, costs and expenses will be stayed pending plaintiffs' appeal to the Fourth Circuit Court of Appeals. (Dupree) CIV OB #68, pg. 8. CC to counsel.
4/29/85	263	PUBLISHED OPINION OF THE FOURTH CIRCUIT – Affirming the decision of the dist. ct. CC to Judge Dupree. jrj
	264	JUDGMENT OF THE COURT OF APPEALS – AFFIRMED. CC to Judge Dupree. jrj
	265	BILL OF COSTS – costs are taxed by the Clerk of the US Court of Appeals for the Fourth Circuit in the amount of 225.00 CC to Judge Dupree. jrj
		Case file to Judge Dupree for ruling on motion for attorneys fees, costs and expenses. Record in Room 630. jrj
5/14/85	266	ORDER – that the defts. motion for attorneys' fees is DENIED and defts. motion for costs on appeal is ALLOWED. (DUPREE) CIV OB #78, p. 171. CC to parties. jrj

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

CIVIL NO. 2879

P. E. BAZEMORE, ET AL., PLAINTIFFS

VS.

UNITED STATES OF AMERICA, ET AL.,
PLAINTIFF-INTERVENORS

VS.

WILLIAM C. FRIDAY, AS PRESIDENT
OF THE UNIVERSITY OF NORTH CAROLINA, ET AL.,
DEFENDANTS

MEMORANDUM OF DECISION AND ORDER

CIV. O.B. #54, P. 41

Various black employees and service recipients of the North Carolina Agricultural Extension Service (NCAES) brought this action on November 18, 1971 pursuant to 42 U.S.C. §§ 1981, 1983 and 2000d (Title VI of the Civil Rights Act of 1964) against multiple government officials alleging racial segregation and discrimination in employment practices and delivery of services by the NCAES. Plaintiffs generally contend that (1) black NCAES employees receive lesser pay and positions on account of their race; (2) NCAES services are segregated and blacks receive inferior service from the NCAES; (3) the NCAES maintains racially segregated Homemaker Extension Clubs and 4-H Clubs.

The defendants are the United States Secretary of Agriculture; the Administrator of the Federal Extension Service; the president of the Consolidated University of North Carolina (UNC); the Chancellor of North Carolina State University (NCSU); the Director of NCAES; the Board of Governors of UNC; UNC; and three county commissioners. All individual defendants are sued in their official capacities.

On April 7, 1972, the United States intervened as a party-plaintiff. The defendants thereafter filed a third-party complaint against the Secretary of Agriculture and Administrator of the Federal Extension Service in their official and individual capacities. The court realigned the third-party defendants, however, as plaintiff-intervenors on July 21, 1972. The parties engaged in extensive discovery until the completion date on March 23, 1973. Since then, the court has conducted two pre-trial conferences, one as recently as December 29, 1978. Currently pending are five matters awaiting decision: (1) plaintiffs' motion to certify proposed plaintiff and defendant classes; (2) plaintiff United States' motion to amend the intervention complaint to include allegations of racial and sexual discrimination in violation of Title VII (42 U.S.C. § 2000e, *et seq.;* (3) question of whether the Eleventh Amendment bars recovery of back pay; (4) the Secretary of Agriculture's motion to dismiss defendants' counterclaim (formerly designated as third-party complaint prior to realignment); and (5) plaintiffs' motion to reopen discovery.

CLASS CERTIFICATION

A. *Proposed Plaintiff Classes.*

Plaintiffs first seek to certify four subclasses consisting of black and Indian NCAES service recipients and members of Extension Homemaker and 4-H Clubs, pur-

suant to F.R.Civ.P. 23(b)(2).[1] Plaintiffs contend that only black agents are assigned to render services to black NCAES recipients and that the Extension Homemaker and 4-H Clubs are racially segregated in contravention of the Fourteenth Amendment and Title VI.

Rule 23(b)(2) was tailored to remedy this type of alleged discrimination, for civil rights actions are by their nature amenable to class relief. Black plantiffs have, therefore, often represented fellow blacks who receive services on a segregated basis. *E.g., Bailey v. Patterson,* 369 U.S. 31, 32-33 (1962), *cited in East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 403 (1977); *Nesmith v. Young Men's Christian Association of Raleigh, N.C.,* 273 F. Supp. 502 (E.D.N.C. 1967), *reversed on other grounds,* 397 F.2d 96 (4th Cir. 1968). Discrimination cases do not, however, qualify as class actions per se. The burden is upon the moving plaintiffs to prove the requirements of Rule 23 are met. Plaintiffs do not carry their burden merely because of their race or request for class relief. *Doctor v. Seaboard Coast Line Railroad Company,* 540 F.2d 699 (4th Cir. 1976). Nor do they carry the burden by filing "boilerplate memoranda laden with self-serving conclusions." *Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1312-13 (4th Cir. 1978). Rather, the moving party must come forward with facts obtained in extensive discovery showing the necessity for class relief. *Id.; see* Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance With Federal Rule of Civil Procedure 23(a),* 19 Wm. & Mary L.Rev. 469, 516-17 (1978).

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[1] "An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * * *

"(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;"

The parties have engaged in extensive discovery in this case; but the only factual basis brought forward by the plaintiffs in support of class certification is their unverified complaint. Plaintiffs have pointed to no facts within the record built by discovery showing the prerequisites of Rule 23 have been met.[2] Plaintiffs have therefore failed to meet the burden imposed upon them to show the need for class certification of NCAES service recipients, and the motion for class certification of the putative subclasses is therefore denied.

Plaintiffs also seek class certification of all NCAES black and Indian employees since November 18, 1971. Certification of this class must be denied for the same reasons enunciated above. However, certification of this putative class would remain unlikely even if plaintiffs were able to make a substantial factual showing, for the courts have tightened Rule 23 standards in employment discrimination cases. *Shawe, supra.* A brief description of the NCAES program reveals the rationale for the increased restrictions.

The NCAES was established as a part of NCSU by federal and state legislation for the specific purpose of extending the University's educational service to North Carolina farm families on subjects relating to agriculture, home economics, and youth, as well as community and natural resource development. The Service is the principal means by which the University's research findings and the subjects are communicated to the people.

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[2] Plaintiffs' counsel represented to the court during the pre-trial conference held December 29, 1978 that they would come forward with information gained from discovery, summarize it, and submit it in support of their class certification motion (see Tr. pp. 45-46). The court never received this information.

The Service operates as a partnership between three levels of government - federal, state and county. These levels are officially represented by the United States Department of Agriculture (USDA), NCSU, and the county boards of commissioners. The Service operates in each of North Carolina's one hundred counties, with a small percentage of its employees located in the Raleigh headquarters. By this arrangement, county extension agents are joint employees of NCSU and the counties in which they work. They are also official representatives of the USDA.

The NCAES provides a share of the salaries for the county personnel. The salaries are determined jointly by the Service and the county board of commissioners. The NCAES sets the minimum requirements and qualifications for employment and receives and examines applications. It recommends qualified applicants to the county commissioners. The Service accepts responsibility for the administration and supervision of the extension programs and provides a staff of specialists to continuously train the agents in the current technology. In return, each county provides a share of the salaries as well as office space and equipment, etc.

The counties confer with the Service on all personnel action and proposed programs so that they may be tailored to the special needs of the particular counties. Indeed, North Carolina counties vary widely in size, population, topography and agrarian needs. Thus, the labor market available to each county widely differs according to geographic perferences and particular skills needed. Moreover, the racial composition of each county varies. For instance, blacks constitute a majority in some of the eastern tobacco counties, while blacks are a rarity in some of the western regions.

One must conclude, therefore, that "across-the-board" employment discrimination by the NCAES in each of the one hundred counties could not be done in a manner so

that each victim's claim would be guaranteed to be "typical" of the other claims within the class, as required by Rule 23(a). The Supreme Court requires that the district court must assure itself that the class representatives are in fact members of the class they purport to represent. Because the manner of employment discrimination widely varies according to different work facilities, available personnel and managerial needs, the burden of proving that the class representatives are in fact members of a broad class in "across-the-board" employment discrimination cases is difficult. Moreover, the Fourth Circuit requires in employment discrimination cases that all the plaintiff representatives and all the class members must be from the same work facility within an employer's network of multiple work locations and in the same type of employ, *Hill v. Western Electric Company, Inc.*, 596 F.2d 99, 102 (4th Cir. 1979), particularly when the multiple work facilities draw from different labor markets and have different types of work positions. *Patterson v. American Tobacco Company,* 535 F.2d 257 (4th Cir. 1976). A representative plaintiff cannot represent workers within the same facility who hold a different type of job or employees in different facilities with the same kind of job. *Hill,* 596 F.2d at 102.

In the instant case, black and Indian NCAES employees are scattered over the state, holding different jobs and specialities according to the needs of the particular counties in which they work. The representative plaintiffs of the putative class come from roughly thirty of the one hundred counties. In no sense can they be deemed to work within the same facility or hold the same job or position as each of the other black and Indian NCAES employees in the remaining seventy counties. Accordingly, the individual plaintiffs cannot be deemed to be members of the class which they purport to represent. *Rodriguez, supra.* Class certification of the plaintiff employee class is therefore denied.

B. *Defendant Class.*

Plaintiffs have also moved to certify as a class all county commissioners of North Carolina's 100 counties. The motion is meritorious at first blush, for any judicial decree imposed upon the NCAES would directly affect the governing bodies of each of the counties. The county commissioners work closely with NCAES officials, and any restraint upon the NCAES would necessarily restrain the commissioners. Nevertheless, the plaintiffs cannot maintain an action against all the county commissioners for lack of standing to sue. No Article III "case or controversy" exists when a representative plaintiff has not suffered an "injury in fact" imposed by *each member* of the putative defendant class. *O'Shea v. Littleton,* 414 U.S. 488 (1974); *Weiner v. Bank of King of Prussia,* 358 F. Supp. 684 (E.D. Pa. 1973).[3] Here, the prerequisites of Rule 23 are likely met; nevertheless, the plaintiffs cannot bootstrap themselves into standing they lack under the Constitution merely because they fulfill the requirements of the federal rules. *Weiner,* 358 F. Supp. at 694, citing 28 U.S.C. § 2072 (Rules Enabling Act); Comment, *Jurisdical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship of Standing and Typicality,* 58 Boston Univ.L.Rev. 492, 497 (1978). Because not all of the plaintiffs have dealt with every county commissioner in North Carolina, they cannot establish direct injury caused by each defendant class member. Accordingly, plaintiffs' motion to certify the defendant class is denied for lack of subject matter jurisdiction.

MOTION TO AMEND INTERVENTION COMPLAINT

The United States moved on February 28, 1975 to amend its intervention complaint to include allegations of

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[3] The requirement that each representative plaintiff must be injured by each member of the defendant class is not eased if a plaintiff class if certified. *O'Shea, supra.*

racial and sexual discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.* The defendants strenuously object to the motion, citing delay and the burden that would be placed upon the defendant should the amendment be allowed.

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given if justice so requires." Whether justice requires leave to amend depends, however, upon a balancing of the factors enunciated in *Foman v. Davis,* 371 U.S. 178, 182 (1962): (1) whether an amendment would unduly delay the litigation; (2) whether the motion is made in good faith; (3) whether the non-movant would be unduly prejudiced by allowance of the amendment; and (4) whether the amendment on its face would fail to be of benefit to the movant's case.

First, a substantial probability exists that the litigation would be unduly delayed should the United States' proposed amended complaint be allowed in its entirety. An inquiry into whether the defendants have engaged in sexual discrimination in violation of Title VII would introduce a new lawsuit into this already prolonged litigation. Insofar as the amended complaint alleges racial discrimination, however, a delay would not likely be caused. The parties have already engaged in substantial discovery and fact investigations, the fruits of which can be used to prove violations of Title VII as well as Title VI and 42 U.S.C. §§ 1981 and 1983. Moreover, the case has not been calendered for trial.

Nevertheless, the case is one of the oldest on the Eastern District's docket. Two pre-trial conferences have been held as well as a lengthy motion hearing. Should the amendment concerning sexual discrimination be allowed, the court's efforts to adjudicate the thousands of other cases awaiting ruling in this one-judge district would be further frustrated.

Secondly, the record does not reveal that the delayed motion has been made with any malevolent purpose. It was settled only recently that the United States could bring Title VII actions against governmental entities. Still, the United States delayed three years after Congressional authorization to bring Title VII suits and two years after the close of discovery in bringing this motion. Defendants' counsel were not apprised of the plaintiffs' concerns with sexual discrimination until one month before the motion was filed.

Thirdly, the amendment manifestly would aid the plaintiffs' case due to the more lenient standard of proof and the availability of money damages against the state in Title VII actions. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).

Fourth, the likelihood of undue prejudice to the defendants is high should the amendment be allowed. The issues have been joined in this action for roughly nine years; the parties have expended considerable time, effort and money. Should allegations of sexual discrimination be allowed, defendants would be forced to incur increased costs and attorney fees while their counsel would be engaging in further protracted discovery and investigation into discrimination in the NCAES based upon sex. On the other hand, little additional effort would be required in order to shed light on racial discrimination as applied to Title VII.

The court concludes upon balancing these facts that the amendment should be allowed, but only insofar as it alleges racial discrimination. Insofar as the amended complaint alleges sexual discrimination, however, the motion to amend is denied. The court's ruling strikes a balance between protecting the rights of the original plaintiffs under all the applicable statutes and the court's responsibility to insure continuous and expedited flow of its docket.

RECOVERY OF BACK PAY

The court raised *sua sponte* the issue of whether plaintiffs' prayer for back pay was barred in all instances by the Eleventh Amendment. The parties have submitted scholarly briefs on this issue and the court has been aided by decisions that have come down since that time.

The court must first address the preliminary question of whether any of the defendants are the "state" as contemplated by the Eleventh Amendment.

William C. Friday, President of Consolidated University, John T. Caldwell, Chancellor of NCSU, and George Hyatt, Jr., Director of NCAES, are all sued in their official capacities. The UNC Board of Governors and UNC itself are sued as separate entities. Plaintiffs contend that the Eleventh Amendment prohibition does not apply to these defendants for they cannot be deemed officers or agencies of the State of North Carolina. Plaintiffs note that UNC and its Board of Governors are separate corporate bodies politic, capable of suing and being sued, and are able to issue corporate bonds without liability by the state. Nevertheless, the Board of Governors develops and presents to the General Assembly on behalf of UNC a single, unified *recommended* budget. N.C.G.S. § 116-11(9)a(11). The recommended budget includes provisions for salaries, which presumably encompasses back pay. Therefore, should the court award the plaintiffs back pay, the funds available for satisfying the judgment must necessarily come from the state treasury. UNC, its Board of Governors and officers must be deemed to be agencies of the State of North Carolina. *Thonen v. Jenkins,* 517 F.2d 3 (4th Cir. 1975).[4]

Assuming the defendants are agencies or agents of the state, the court must address the issue of whether the Eleventh Amendment bars recovery of back pay in lawsuits under the statutes asserted by the plaintiffs.

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[4] The plaintiffs in *Thonen* brought their action in 1971 after passage of Chapter 116 of the North Carolina General Statutes.

1. *42 U.S.C. § 1981.* Back pay is not recoverable against the state or state agencies under 42 U.S.C. § 1981, but is recoverable against counties and their officers. *Wade v. Mississippi Cooperative Extension Service,* 424 F. Supp. 1242 (N.D. Miss. 1976), *on remand,* 528 F.2d 508 (5th Cir. 1976).

2. *42 U.S.C. § 1983.* Back pay is not recoverable against the state, its agencies or its officers in their official capacities. *Edelman v. Jordan,* 415 U.S. 651, 675-77 (1974).

3. *Title VI.* Back pay is not recoverable under 42 U.S.C. § 2000d. *Gilliam v. City of Omaha,* 388 F. Supp. 842, 847 (D. Neb. 1975), *citing Edelman, supra, aff'd on other grounds,* 524 F.2d. 1013 (8th Cir. 1975).

4. *Title VII.* Back pay is recoverable from the state treasury in Title VII actions, notwithstanding the Eleventh Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).

5. North Carolina counties and their officers in their official capacities do not enjoy the protections of the Eleventh Amendment. *Atkins v. City of Charlotte,* 296 F. Supp. 1068 (W.D.N.C. 1969); *see Edelman, supra.*

UNITED STATES' MOTION TO DISMISS COUNTERCLAIM

Defendants asserted in their third-party complaint filed April 21, 1972 that the third-party defendants (Secretary of USDA and Administrator of the Federal Extension Service) are ultimately liable for any monetary award assessed against the defendants and that the third-party defendants have applied various statutes and regulations to the defendants in a manner violating the equal protection clause of the Fourteenth Amendment. The third-party defendants filed a motion to dismiss the third-party complaint on June 22, 1972. The court afterward realigned the third-party defendants as plaintiffs on July 21, 1972. The court specified in the realignment order that "[a]ll claims and requests for relief set forth in the Third-Party Complaint are hereby preserved as . . . counterclaims." The United States' motion to dismiss the third-party complaint, is now treated as a motion to dismiss the counterclaim.

1. Plaintiffs first pose a series of objections in their motion to dismiss dealing with defendants' compliance with Rule 14, F.R.Civ.P. - impleader (third-party practice). Because the court now treats the third-party complaint as a counterclaim, however, plaintiffs' objections regarding compliance with Rule 14 are irrelevant.

2. Defendants allege in their counterclaim that applicable federal statutes and regulations merely require non-discrimination and do not compel affirmative-action responses to a past history of racial discrimination. Defendants contend, however, the plaintiffs are imposing an affirmative action program upon the defendants and not upon any other state agency in the country. This practice, defendants argue, violates the equal protection clause. Plaintiffs state in their motion to dismiss that a letter from the EEOC office to the Director of NCAES shows that defendants' allegations are erroneous in that the plaintiffs have merely required the defendants to take actions approved by courts in other contexts.

Plaintiffs' argument is without merit for several reasons. First, the plaintiffs' motion to dismiss the counterclaim pursuant to Rule 12(b)(6) merely tests the sufficiency of the allegations within the counterclaim, without reference to facts appearing outside of the pleadings. The court cannot, therefore, consider the contents of the EEOC letter to the defendants without treating the motion as one for summary judgment under Rule 56, and then only after appropriate notice to the defendants. No notice has been given to the defendants that the plaintiffs are treating the motion as one for summary judgment. Secondly, a review of the letter indicates that the plaintiffs seek to impose a quota system on the defendants in that the plaintiffs have required that fifty per cent of all position vacancies are to be filled with minority groups until the racial composition of the NCAES reflects the racial composition in the community. Thirdly, plaintiffs' argument that the affirmative action plan merely tracks a

program approved by a court in another context does not address defendants' allegations that the plan is imposed in contravention of the equal protection clause.

Accordingly, plaintiffs' motion to dismiss the counterclaim is denied.

PLAINTIFFS' MOTION TO REOPEN DISCOVERY

The plaintiffs move to reopen discovery on the basis that the racial composition for the NCAES and various employment practices may have changed over the years since the close of discovery. The defendants object only on the basis that the proper scope of discovery cannot be ascertained until the court has ruled on the class certification motions, the motion to amend the original complaint to include Title VII, the back pay issue, and the motion to dismiss the counterclaim. Since the court has now ruled upon all outstanding matters, the permissible scope of discovery is clearer. Moreover, the court could benefit from a factual appraisal of the current racial balance and employment practices within the NCAES. The data would directly affect the need, mode and scope of any judicial decree that may be rendered in the case. The parties are allowed to and including February 1, 1980 within which to complete discovery.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

OCTOBER 9, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

CIVIL NO. 2879

P. E. BAZEMORE, ET AL., PLAINTIFFS

VS.

WILLIAM C. FRIDAY, ET AL.,
DEFENDANTS

ORDER

This action came before the court for hearing on various pending motions on July 17, 1981, and it is on the basis of the arguments of counsel and the memoranda of record that the court makes the following rulings.

On November 5, 1979, plaintiffs moved the court to reconsider its order of October 9, 1979 which denied the motion for certification of a plaintiff and defendant class under Rule 23 of the Federal Rules of Civil Procedure. After careful review of the additional filings in support of plaintiffs' motion to reconsider and consideration of the arguments presented, the court concludes that the decision to deny class certification was correct and in accordance with the law in this circuit. *See Hill v. Western Electric Company, Inc.*, 596 F.2d 99 (4th Cir. 1979); *see also Abron v. Black & Decker, Inc.*,__F.2d.__, No. 79-1871 (4th Cir., decided July 17, 1981). Accordingly, the motion to reconsider and certify a class is denied for the reasons set forth in the court's order of October 9, 1979.

Good cause having been shown, the motion of plaintiff-intervenors to set aside the default entered against them on November 6, 1979, is allowed. Rule 55(c), F.R.Civ.P.

The defendants' motion for a protective order, filed on January 8, 1980, is denied. However, the court would encourage the parties to mutually agree to reasonable limitations on the scope of discovery in order to expedite the disposition of this case.

Although it appears to the court that the discovery sought by defendants' motion to compel, filed February 14, 1980, has been or is being provided by plaintiffs, the motion is allowed and plaintiffs are directed to continue their efforts to complete their answers to defendants' interrogatories.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

JULY 29, 1981.

TRIAL TESTIMONY OF THOMAS BLALOCK (EXCERPTS)

[3811] * * * * *

Q. Dr. Blalock, there has been some testimony here with respect to a decision in connection with the 4-H and Homemakers Clubs in the so-called reasonable action or reasonable effort. Do you recall that testimony when Dr. Harwood was testifying? It involved an inquiry into the cost of reasonable effort programs?

A. Oh, yes; I do. Yes.

Q. Are you familiar with that situation?

A. Yes.

Q. And the incidents that transpired at that time?

A. Yes. I recall that.

Q. If you would, would you relate to the court your recollection of the problems?

A. The situation that led to that particular discussion related to the 1974 Civil Rights initiative. All reasonable effort, as has been defined by the Department of Agriculture, in terms of organizing and maintaining clubs in biracial communities at one time involved knocking on doors and getting a signed affirmation from individuals—either youth or adults in that community—that they had been contacted and did not wish to participate.

They later modified that to simply include that you had to knock on doors and invite people to [3812] participate. We were debating at that time whether we ought to take that step in North Carolina as one further step of trying to comply.

At that time, Dr. Stormer was on our staff and had been in Texas at the time the Texas Extension Service had implemented the Affirmative Action Program in Texas that included the all reasonable effort. That did include the knocking on doors in individual communities.

And Dr. Stormer estimated for us the magnitude of the expense in taking that one step in all reasonable effort. It was my judgment, and based on conversations with Dr.

Stormer and other state people who had been through that, that in terms of what this achieves in relation to the cost, it is not very great; that it is not a very cost-effective step.

And so I had concluded that we would not take that step because of the limited resources we had. At that time we were dealing with some rather tough budget problems. That did not seem to me to be the highest priority use of staff resources to have them knocking on individual doors checking with individual youngsters or adults in that community.

And so we made an inquiry to your office as to the impact of this and what we ought to do on the suit. But I had already made the decision that I was not going [3813]to do that, regardless of what your advice was, because of the cost. I did not feel it was a cost-effective thing.

The Court: Were you trying to get him to knock on doors, and he would'n't do it?

The Witness: No, sir; he did not, fortunately. But I had made the decision before his response came back.

By Mr. Manning, Sr.:

Q. As a manner of fact, the cost factor had been brought out in a meeting which I attended two years before; Had it not?

A. Yes; It had. Yes.

Q. And that was what was discussed?

A. Yes.

The Court: You say even if he had recommended it—

The Witness: (Interposing) He had said—I did not ask him whether we should do this or not. I asked him the impact of this. If we did something of this sort, is this going to incriminate us? Is this going to give us problems if we go into court?

And we have kept a dialogue with him of trying to not inadvertently stumble into something that we didn't intend to do. So I did not ask him. I made up my [3814] mind that even if he said, "I see no problem as an impact on your suit," I was not going to take that step at this time.

[3907] * * * * *

Q. Dr. Blalock, based upon your attendance at that meeting, did it cause you to raise questions related to the salaries of black employees and female employees in the North Carolina Extension Service?

A. Of black and female employees?

Q. Yes.

A. Yes. The EEO Program deals specifically with those two categories of employees, and so that would have been our concern.

Q. All right. And that memoranda specifically indicates that black males and females were your concern—or women were your concern; is that not true?

A. I would have to reread the memorandum to be sure of that. It's been a long time. May I?

Q. Yes.

[3908] (Witness peruses document.)

A. Yes. My notes would indicate that I concluded that we had a concern in this area and indicated the reasons why differences in salaries existed. The competitive market being one of the factors—that there was a competitive market for—

Q. (Interposing) Not to interrupt you, but what paragraph are you reading from?

A. I'm reading from item eight on the third page.

Q. Would you read the entire item, please?

A. Yes.

". . . Believe you'd agree our salaries for women and nonwhite men on average are lower—our figures would verify—due to several factors."

The first point:

". . . The competitive market. This is not acceptable as a reason though."

And I do not agree with that.

Q. Even though you wrote it?

A. I do not agree with the fact that it is not accepted.

Q. But that was your view at the time?

A. That the competitive market is a factor in [3909] causing differences in salaries; Yes.

Q. But you said it is not an acceptable reason?

A. They had indicated in Washington that that was not an acceptable reason.

The Court: It would be helpful if you would explain to me the circumstances. What did this memorandum embody? Did it purport to show what you thought about something, or were you reporting on some meeting you attended, or just what was it?

The Witness: I was reporting on a meeting I attended, the information I had gained out of that meeting, what it appeared we were going to have to do in the future, and some needs that I felt we had to—some areas that we needed to do something about in North Carolina.

The Court: I think his question is, when you write saying "This is not acceptable as a reason though," Did you mean it was not acceptable to the authorities who were in charge of implementing the EEO Act or not acceptable as a reason to you personally?

That was your question?

Mr. Padgett: Yes.

The Witness: That was my—that's what—and remember these are notes. This is not a published presentation, but something that I used to speak from. [3910] The statement was intended to convey that the officials in Washington did not accept the competitive market as a justification for any differences in salaries that might exist. My explanation was that I do not agree with that conclusion because it is an economic reality that we deal with every day and only seem to have problems when it deals with either race or sex of accepting that it isn't a factor.

The second point under there is "tradition." Again, that salaries for women and blacks traditionally have been lower; and third, that it was "less county support for non-white positions," which again was a traditional thing.

By Mr. Padgett:

Q. When you were talking about tradition, you were talking about in the State of North Carolina at that time?

A. No, sir, I was talking about nationally.

Q. That would include the State of North Carolina?

A. Of course.

Q. Directing your attention further in your memoranda to paragraph 17 and 18—

A. (Interposing) Yes.

Q. —Have you had an opportunity to review paragraphs 17 and 18?

[3911] A. Yes; I have.

Q. Would you read paragraph 17, please?

A. Paragraph 17 says:

". . . majority are $500-$700 range. County should probably do $300-$400 also—for total of $800-$1,100."

Q. Was that your calculation as to the average difference in salaries of black males and females, or women?

A. This was a figure that I had concluded that we ought to do to make the adjustments in salaries that we needed to make at that time in response to the changing salary structures of our entry level salaries and in response to what we knew we were going to have to do as a result of the EEO Act.

Q. And as it related to incumbent employees?

A. Pardon me?

Q. As it related to incumbent employees?

A. Incumbent?

Q. Yes.

A. Yes.

Q. Those figures relate that of the $800 to $1,100 that only $300 to $400 of it would be accountable to the counties; Is that correct?

A. Yes.

[3912] Q. And that $500 to $700 would be—the State would be accountable for?

A. Yes.

Q. Or that would be the difference?

A. Yes.

Q. And was "18" your specific recommendation?

A. Beg your pardon?

Q. And what was "18"? Would you read "18" for us?

A. Eighteen says:

". . . No one gets less than $500."

We had concurred that we would do an across the board—at least $500—on those employees affected. It says:

". . . I believe no one will get less than $200 July, assuming the 5 percent increase."

At this stage—and I'm assuming this must have been done in the spring while the General Assembly was still in session and had not taken final action on salary increases—we had anticipated that no one would get less than a $200 total increase at that time.

Q. Was this actually, in fact, carried out?

A. Number 18?

Q. Number 18.

A. I cannot recall. I really can't. I do not remember what happened that year.

[3913] Q. Do you recall if the State did, in fact, get the counties to contribute $300 to $400?

A. I would say in the majority of the cases, no.

Q. The majority of the cases, no?

A. Yes.

Q. Did you ask the counties to contribute?

A. Yes. In every case, we asked the counties.

Q. You asked them to contribute and they didn't?

A. Yes.

Q. Did you follow up on it after you initially asked them?

A. What do you mean by "follow up"?

Q. I mean utilize the available leverage or resources that the State had to encourage counties to take an action that the Extension Service thinks is appropriate.

Mr. Manning, Sr.: Objection to the word "leverage." I don't know what you mean. Like the Federal Government holding up funds? Objection, if your honor pleases, to the form of the question.

The Court: Overruled. I'll let him say what he did.

The Witness: We have no leverage. Ours is totally persuasion, and we made a—I would say—concerted effort by persuasion. This was not something we [3914] sent them in a memorandum and asked them to respond to. We visited personally with the counties and explained to them what was being done and what their obligations were and asked for their contribution. We were successful in some; we were not successful in others.

* * * * *

TRIAL TESTIMONY OF DONALD STORMER (EXCERPTS)

[4979] * * * * *

These other ones are similar. And again, I don't have the newspapers on all of these. This one says Whiteville, October 1981. There are just numerous—I doubt if there is a 4-H Club ever organized in the State of North Carolina that there isn't some public notification.

Q. What is the policy of the State 4-H and the North Carolina Agricultural Extension Service on notice with respect to race?

A. It is our policy that the organization of a unit will get public notification. These are handbills that are posted in schools and other places where kids frequent to let it be known that there is a club or group [4980] being organized; and that we would solicit their participation.

[4986] * * * * *

A. Yes. The state membership has remained relatively stable during that period time.

Q. At 95,453 in 1980?

A. Yes—beginning with 95,589 in 1974.

Q. Now, directing your attention to number 227—defendants' 227—would you explain that, please, sir, to the Court?

A. Yes. This is a racial breakdown for volunteers and 4-H members for the years '72, '76 and '80. I call your attention first to the volunteers. In 1972 there were 2,665 black volunteers. In 1980, there were 4,022. While the percentage of our total volunteers who were [4987] black decreased from 31 percent in '72 to 27 percent in 1980, the actual numbers increased greatly.

And I think you will see as you go to the white side of this table that we had a rather dramatic increase in the number of white volunteers as well, going from 5,988 in 1972 to 11,122 in 1980. And of course—

Q. (interposing) Now, also—excuse me. Go ahead.

A. Well, the importance of this I think you can see. We in our mission statement say 4-H is operated by volunteers. We label it as a key result area in our management matrix. And it is an area where we feel we have to perform to have a successful program.

Q. And in the growth total, you have moved from 8,600 to 15,144?

A. That is correct.

Q. Now, under 4-H membership, you have given your total growth there based on a racial breakdown?

A. Yes. In 1972 there were 22,174 black youngsters in the 4-H program. In 1980 there were 30,243, maintaining 32 percent of the membership. Conversely, in 1972, 46,313 were white; and in 1980, 64,138. You can see the growth of the program from '72 to '80.

Q. Just based on your experience, do you have any or can you give the Court any input as to why the black [4988]

leadership has dropped down; and yet the number of—other than between '76 and '80, the black membership has increased and increased really from '72 to 1980 by some 8,000 members?

A. Well, in actuality the numbers of black volunteers have increased. But the whites have increased at a faster rate, I think is the explanation there. You can see we almost doubled the corps of volunteers during that period. We did not double in membership.

And that has been our press—has been for volunteers. We feel that if we can get the volunteers, the children are there to be served.

Q. In both instances, what does the ratio of percentage of black leaders and members bear as to the ratio of population of the state?

A. Well, we are well above the State's population of about 22 percent, I believe—27 percent for volunteers and 32 percent for 4-H members at the present time.

[4992] * * * * *

Q. Now, Dr. Stormer, were you involved in the decision that we have heard so much about as to not getting into the knock on door policies?

A. Yes.

Q. All right. Would you mind explaining your involvement to the Court in connection with that matter?

A. I guess I triggered that series of events with a memo that I wrote in 1977. I want to be candid with the Court in this case. I have a strong personal commitment to civil rights. And in the process of examining those initiatives, I got the wrong copy.

Another confession, I guess, is in order. There are three drafts of those 1974 initiatives. And when I sent my secretary to the file, I got "a draft" [4993] that was not "the draft" or the final draft. And it said something different than the final draft.

I wrote the memo explaining the reasonable effort rule to district chairmen and asked that the documentation be kept in those cases where it was used. Betsy Meldau, one of our district chairmen, quickly noted the discrepancy between my memo and those 1974 initiatives and called it to our attention.

And that started the sequence of discussions that finally wound up in the Administrative Council in terms of the Reasonable Effort Rule—or all reasonable effort.

The Court: Maybe he and Dr. Black better check behind their secretaries.

By Mr. Manning, Sr.:

Q. And what happened? Just briefly relate it. We have been into it before. But just briefly relate the sequence of events.

A. Well, in the discussion, I think we were all interested in being good citizens and doing everything that we thought was morally right to bring about as much integration as possible in our programs. And we had a number of discussions in terms of whether we should or should not adopt the Reasonable Effort Rule.

And we finally took it to the Administrative [4994] Council for discussion. As you have heard before, there was unanimity among the Council that we would go ahead with the Reasonable Effort Rule based on some consultation. Based on that and some other further discussions that we had as program leaders, we rescinded that action and did not go with Reasonable Effort.

Now, my reasoning for not going with it was different than some others, as I have heard testimony being given here.

Q. What was your reasoning?

A. I guesss there are two reasons, the first one being that this case was apparently coming to a close. We had the 1974 initiatives in the field.

Q. I believe the judge would feel better if you would say it was coming to trial, because at this point he doesn't think it is ever coming to a close.

A. There was some action in this particular case.

The Court: Mr. Manning, you have expressed the Court's feelings with customary exactitude.

Mr. Manning, Sr.: Your pain caught me all the way out here, your honor. That is why I felt compelled to say that.

By Mr. Manning, Sr.:

Q. All right, sir?

A. We already had the 1974 initiatives in the [4995] field with the pending activity in this case. If we went to the field with the All Reasonable Effort provision and then the Court would decide something else, we could have had three different sets of initiatives in the field within a period of approximately five years.

And I felt that would be very confusing because, you know, we don't just go to the field and train our staff. If we start working in an area like this, we go to our Advisory Committees. We talk it through with them. We believe that the only way you get commitment is through involvement; and that the people would have to act and react to these things and help us accomplish them.

And to go out and do that three times within five years with something different would not be very helpful to our cause.

Q. What was your other reason?

A. Well, the second reason was it is just not good management to ask our agents to go knock on doors. If you are going to work through others, then you do it that way. And we had requested that our agents function more as managers and quit operating. And this would be a request to have them operate again.

Q. What would be the effect of taking an agent's time to have the agent knock on doors in the concept of your management of your program?

[4996] A. Well, you will have a net reduction in program. You have to have. If you divert management time to operating time, you are using your resources in a different way. And it would have to influence the kind of outreach that an agent could make.

Q. If you take the agent's time in this specific area to do this specific function, what would be its effect on his other duties that you have already enumerated?

A. Well, someplace—he would have to give up something from management to go operate. And we would have a reduction in program quality or in quantity. It would have to happen that way.

Q. Now, in connection with the actual efforts to mix two clubs in a community—either white or black—would you give the court your experience as to the basic formation of community clubs and what experience, if any, you had, say, in Texas in this area, which was operating under a court order?

A. Well, that strategy is basically a loser from my experience. People who have a club—

[5028] * * * * *

A. This is paragraph four of this memorandum. It says,

"The single most vulnerable area in assessing the progress of State 4-H affirmative action programs is the high number of 4-H clubs and 4-H special groups in mixed communities which have youth of only one racial-ethnic group. Approximately one-half of the states each have more than 500 such units."

Q. Now, utilizing that information, did you make a calculation to compare North Carolina with that information?

A. Yes, I did.

Q. Did you prepare an exhibit to that effect?

A. I did.

Q. Is that exhibit number 229?

A. Yes.

Mr. Manning, Sr.: At this time, in the interest of having him explain it with the Court having a copy, I would like to offer in evidence defendants' exhibit 229.

(Defendants' Exhibit 229 was marked for identification and received in evidence.)

[5029] By Mr. Manning, Sr.:

Q. Now, if you would, would you go through the processes that you used, using 229 as a basis, how you arrived at your comparison?

A. Using 500 as the median number of units—you will recall a median is a middle number different from a mean—I took an array of the states' enrollments for that year, 1978, and found the median figure in that array which was Minnesota with an enrollment of 67,518.

North Carolina's enrollment in 1978 was 97,045. With these data, you can proportion what you might expect in North Carolina using that kind of a computation. You simply set up a proportion that 67,518 is to 500 as 97,045 is to "x" and cross-multiply.

The expected number of such units in North Carolina, proportioned on the basis of enrollment, would be 719. The actual number in 1978—

Q. (interposing) Is that 718 or 719?

A. 718. The actual number was 920. Now, that computation does not account for race, only for total numbers of members.

Take another tack with it. North Carolina's 4-H program ranks seventh in the nation in terms of black youth participating. That is better than 42 other states. So we simply take the 25th, with 500, and 42 [5030] which is our position with respect to other states in terms of blacks, and we can proportion again. We would come up with an expectation of 840 such units, based on participation by race.

Q. Rather than the 920 just based on the number of units?

A. 920 was the actual number of such units that we had in 1978.

In the first case, we had 202 more units than would be expected on the basis of membership alone. On the basis of race, we had 80 more units than would be expected based on racial composition. Those differences can probably be attributed to affirmative action programs. My feeling is that that is rather a high cost in terms of achieving some—if you took an average of those two, it is something like 140 units.

This would support, I think, Dr. Blalock's testimony that this is not cost effective.

Q. Now, while we are talking about affirmative action recommendations, are you familiar with the first affirmative action recommendation that came out from the United States Department of Agriculture?

A. Yes.

Q. And what did that call for to be done?

A. The first statement in the guidelines, "All [5031] Reasonable Efforts," was nothing more than a phrase in the regulations. It was later defined by saying that in a targeted area of a 4-H Club, we had to get a signed affidavit from all of the minorities saying that they did not wish to participate in our program. That was the first definition of "all reasonable efforts."

Q. That was a definition and not a regulation, was it not?

A. Well, it was a regulation. That was what we had to do.

Mr. Craige: Point of Clarification. What point in time are we talking about, and is there any documentation of Mr. Stormer's statement?

The Witness: We are talking January 1973. I think I can get that close for the first one. I don't have a record of it at the moment.

By Mr. Manning, Sr.:

Q. Were you involved in it?

A. Yes, sir, deeply.

Q. That particular method of going out was a recommendation, was it not, not a regulation?

A. No, sir.

Q. It was a regulation?

A. Yes, sir.

Q. Was it retracted?

[5032] A. Yes.

Q. After that, the next recommendations came in the form of what?

A. A three-step process defining and regulating "all reasonable efforts."

Q. Is that the document, "Strengthening 4-H Programs"?

A. It came out earlier than this document, I believe, but this is a document explaining "all reasonable efforts." This one is dated 1979.

The redefinition came during the calendar year of 1973, I believe, after a protest from ECOP, the Extension Committee on Organization and Policy, in terms of the unreasonableness of "all reasonable effort."

Q. Now, it is your opinion based on the decision, of the action in North Carolina, that it was not economically feasible from a management point of view?

A. It is not cost effective.

Q. And you supported that decision then, and do you still now support it?

A. I do.

* * * * *

GOVERNMENT EXHIBIT 30

Number and percent of NCCES Homemaker Clubs by racial composition of the club and number of members by race

Clubs	All White Clubs	All Non-White Clubs	Integrated Clubs
1972	1,378 (73.8%)	466 (25%)	22 (1.2%)
1971	1,449 (73.7%)	491 (25%)	26 (1.3%)
1968	1,562 (73.0%)	569 (26.5%)	10 (.5%)
1966	1,022 (60.8%)	658 (39.2%)	None listed (0%)

Members	White	Non-White
1972	24,115 (77.8%)	6,869 (22.2%)
1971	25,313 (77.2%)	7,485 (22.8%)
1968	28,023 (75.6%)	9,063 (24.4%)
1966	20,641 (54.5%)	17,227 (45.5%)

Sources: 1) Exhibit 18 of Defendants' Answers to Plaintiffs' first interrogatories of February 4, 1972, interrogatory Number 30, and exhibit Number 1 to the Deposition of Eloise Cofer. A copy of the exhibit 18 is attached. 2) List of North Carolina Homemaker Clubs for 1972 by county showing name of club, total membership, white members and non-white members, produced pursuant to Plaintiff-Intervenor's Rule 34 Request for Production of Documents, of June 8, 1972, Number 2s, and pursuant to Plaintiff-Intervenor's December 21, 1972—Rule for Production of Documents No. 13.

N.C.C.E.S. HOMEMAKER CLUBS

Number and Percent of Members in One Race and Multi-race Clubs

	Members in All White Clubs	Members in All Non-White Clubs	Members in Multi-race Clubs
1972	23,925 (77.2%)	6,694 (21.6%)	365 (1.2%)
1971	24,980 (76.2%)	7,288 (22.2%)	530 (1.6%)
1968	27,913 (75.3%)	8,995 (24.2%)	178 (.5%)
1966	20,641 (54.5%)	17,227 (45.5%)	0 (0%)

Source: 1) Exhibit 18 of Defendants' answers to Plaintiffs' first interrogatories of February 4, 1972, interrogatory No. 30, and exhibit No. 1 to the Deposition of Eloise Cofer. 2) List of North Carolina Homemakers clubs for 1972 by county showing name of club, total membership, white membership and non-white members, produced pursuant to Plaintiff-Intervenor's Rule 34 request for production of documents of June 8, 1972, Number 2s, and pursuant to Plaintiff-Intervenor's Rule 34 request for production of documents of December 21, 1972, No. 13.

EXTENSION HOMEMAKER CLUBS

1971

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	White	Members Integrated Non-White
Alamance	23	7		419	171		
Alexander	9			175			
Alleghany	9	1		150	24		
Anson	10	10		122	120		
Ashe	7			135			
Avery	10			250			
Beaufort	11	4		149	35		
Bertie	10	9		104	71		
Bladen	18	9		309	141		

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	Members Integrated White	Members Integrated Non-White
Brunswick	4			80			
Buncombe	32		1	629		17	1
Burke	14			225			
Cabarrus	24			411			
Caldwell	15			216			
Camden	4	3		65	31		
Carteret	10	1		179	21		
Caswell	16	9		252	125		
Catawba	29			473			
Chatham	13	11		227	149		
Cherokee	7	1		96	10		
Chowan	13	4		200	50		
Clay	7			70			
Cleveland	18	14		282	237		
Columbus	17	5		271	54		
Craven	11	5		180	65		
Cumberland	14	9	1	263	112	5	1
Currituck	10	2		153	54		
Dare	8			150			
Davidson	20			380			
Davie	12	1		182	14		
Duplin	15	8		227	100		
Durham	20	5		337	61		
Edgecombe	13	7		287	200		
Forsyth	31	10		621	135		
Franklin	8	11		95	140		
Gaston	30	1	1	732	11	14	2
Gates	9	10		147	162		
Graham	5		1	80		1	19
Granville	6	11		81	113		
Greene	6	6		104	77		
Guilford	23	11		414	126		
Halifax	13	11		220	167		
Harnett	5		15	65		182	47
Haywood	24	1		513	17		
Henderson	23			460			
Hertford	12	15		158	179		
Hoke	9	4		172	46		

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	Members Integrated White	Members Integrated Non-White
Hyde	8	1		100	16		
Iredell	22	7		552	102		
Jackson	7			132			
Johnston	17	6		300	100		
Jones	8	5		79	41		
Lee	15	1		331	15		
Lenoir	15	12		202	155		
Lincoln	18	2		241	20		
McDowell	16			284			
Macon	20			449			
Madison	9			150			
Martin	16	7		297	105		
Mecklenburg	25	14		649	271		
Mitchell	12			181	148		
Montgomery	10	1		135	15		
Moore	16	5		238	53		
Nash	13	12		166	164		
New Hanover	13	10		235	148		
Northampton	12	7		178	106		
Onslow	17			222			
Orange	14	15		210	224		
Pamlico	10			127			
Pasquotank	14	7		204	97		
Pender	13	3		198	37		
Perquimans	9	10		110	189		
Person	8	7		120	153		
Pitt	18	10		287	171		
Polk	7	1		105	10		
Randolph	14	6		223	94		
Richmond	12	4		176	49		
Robeson	15	26	1	289	487	1	35
Rockingham	25	11		340	118		
Rowan	30	11	1	761	227	90	33

County	Clubs All White	Clubs All Non-White	Clubs Integrated	Members All White	Members All Non-White	Members Integrated White	Members Integrated Non-White
Rutherford	20			300			
Sampson	19	9		301	91		
Sootland	14			220			
Stanly	19	3		325	33		
Stokes	17			347			
Surry	22			418			
Swain	11			190			
Transylvania	12			200			
Tyrrell	13			155			
Union	11	9		142	96		
Vance	10	12		123	160		
Wake	29	11		463	147		
Warren	12	13		138	193		
Washington	11	1		178	15		
Watauga	12			201			
Wayne	15	11		249	119		
Wilkes	21			420			
Wilson	25	5		503	101		
Yadkin	13			196			
Yancey	8			130			
Cherokee Reservation			5			23	59
	1,449	491	26	24,980	7,288	333	197
Grand Total	1,966			32,798			

EXTENSION HOMEMAKER CLUBS

December 18, 1968

	All White		Non-White		Integrated		
Western	Clubs	Members	Clubs	Members	Clubs	White	Non-White
Avery	11	265					
Buncombe	35	834			1	15	1
Burke	13	225					

	All White		Non-White		Integrated		
Western	Clubs	Members	Clubs	Members	Clubs	White	Non-White
Cherokee	10	103	1	12			
Clay	8	120					
Graham	5	85	1	25			
Haywood	25	518	1	23			
Henderson	22	450					
Jackson	14	240			1	16	3
Macon	18	430					
Madison	9	150					
Mitchell	9	150					
McDowell	16	272					
Polk	7	110	1	10			
Rutherford	20	300	1	15			
Swain	12	226			2	41	2
Transylvania	12	216					
Yancey	7	120					
Northwestern							
Alamance	27	433	9	164			
Alexander	11	225					
Alleghany	10	200					
Ashe	10	165					
Caldwell	15	240					
Caswell	15	226	11	150			
Chatham	16	214	13	226			
Davidson	23	380					
Davie	15	275	1	25			
Forsyth	32	760	11	160			
Guilford	24	449	12	153			
Randolph	17	300	9	150			
Rockingham	34	596	11	220			
Stokes	16	340					
Surry	26	475					
Watauga	12	185					
Wilkes	23	500					
Yadkin	14	300					
Southwestern							
Anson	13	170	13	145			
Cabarrus	23	405			1	19	1

	All White		Non-White		Integrated		
Western	Clubs	Members	Clubs	Members	Clubs	White	Non-White
Catawba	27	500					
Cleveland	16	324	14	279			
Gaston	25	510					
Hoke	11	190	2	21			
Iredell	22	532	9	118			
Lee	15	265	1	20			
Lincoln	21	275					
Mecklenburg	30	655	13	239			
Montgomery	11	210					
Moore	17	240	8	100			
Richmond	17	233	8	83			
Rowan	33	845	12	255			
Sootland	13	225					
Stanly	19	325	1	21			
Union	12	185	10	135			
Southeastern							
Bladen	19	328	7	115			
Brunswick	6	100					
Cartaret	9	176	2	34	1	12	3
Columbus	17	278	8	112			
Craven	11	136	9	57			
Cumberland	16	282	11	200			
Duplin	19	284	10	122			
Greene	11	213	6	100			
Jones	10	95	6	50			
Lenoir	13	170	12	132			
New Hanover	12	264	9	118			
Onslow	15	262			1	14	2
Pamlico	13	183					
Pender	11	153	8	260			
Robeson	17	210	33	540			
Sampson	22	375	11	152			
Wayne	19	323	14	169			
East Central							
Beaufort	13	175	6	100	1	13	6
Durham	20	386	5	191			

	All White		Non-White		Integrated		
Western	Clubs	Members	Clubs	Members	Clubs	White	Non-White
Edgecombe	15	355	8	285	1	1	19
Franklin	11	152	12	150			
Granville	9	114	10	100			
Harnett	19	300	7	88			
Johnston	19	355	7	130			
Martin	14	254	9	159			
Nash	13	221	11	192			
Orange	15	245	14	226			
Person	9	200	13	222			
Pitt	20	340	12	190			
Vance	11	166	11	162			
Wake	30	568	12	198	1	9	1
Warren	14	182	14	185			
Wilson	24	500	7	157			
Northeastern							
Bertie	13	225	18	303			
Camden	6	87	3	54			
Chowan	13	204	9	98			
Currituck	13	202	1	36			
Dare	1	115	1	10			
Gates	10	135	11	168			
Halifax	14	350	12	200			
Hertford	13	178	16	192			
Hyde	8	145	1	48			
Northampton	12	177	12	105			
Pasquotank	12	221	8	137			
Perquimans	9	106					
Tyrrell	13	80					
Washington	11	177					

1966

EAST CENTRAL DISTRICT

County	Negro		White	
	No. Clubs	Members	No. Clubs	Members
Beaufort	12	384	20	375
Durham	7	251	17	410
Edgecombe	13	365	17	400
Franklin	16	540	19	300
Granville	15	529	13	206
Harnett	10	150	20	365
Johnston	9	218	27	550
Martin	8	300	15	258
Nash	12	277	33	594
Orange	12	301	16	385
Person	13	405	10	275
Pitt	18	370	21	457
Vance	14	441	16	305
Wake	23	520	33	645
Warren	21	386	17	244
Wilson	12	255	24	500
	215	5,692	318	6,269

NORTHEASTERN DISTRICT

Bertie	15	249	15	238
Chowan	12	239	15	181
Gates	13	235	12	137
Halifax	15	665	17	325
Hertford	16	480	14	230
Northampton	12	325	14	207
Pasquotank	8	118	12	290
Perquimans	10	379	10	175
	101	2,690	109	1,783

NORTHWESTERN DISTRICT

County	Negro		White	
	No. Clubs	Members	No. Clubs	Members
Alamance	6	216	21	422
Caswell	14	385	18	310
Chatham	14	400	20	470
Forsyth	12	385	33	875
Guilford	15	496	35	798
Randolph	14	385	18	375
Rockingham	12	302	32	620
	87	2,569	177	3,870

SOUTHEASTERN DISTRICT

Bladen	16	550	21	425
Columbus	9	285	23	395
Craven	13	150	15	265
Cumberland	12	300	12	424
Duplin	10	200	29	450
Greene	9	200	14	318
Lenoir	12	176		
New Hanover	11	201	16	389
Pender	9	280	18	280
Robeson	19	667	37	725
Sampson	15	395	25	575
Wayne	14	328	23	471
	149	3,732	233	4,717

SOUTHWESTERN DISTRICT

County	Negro		White	
	No. Clubs	Members	No. Clubs	Members
Anson	15	369	14	210
Cleveland	13	397	18	417
Iredell	16	368	27	640
Mecklenburg	13	412	32	822
Moore	10	175	21	388
Richmond	13	300	22	325
Rowan	13	273	31	775
Union	13	250	20	425
	106	2,544	185	4,002

GOVERNMENT EXHIBIT 69

EXTENSION PERSONNEL THAT HAVE BEEN APPOINTED COUNTY EXTENSION CHAIRMAN SINCE 1968 NORTH CAROLINA AGRICULTURAL EXTENSION

MAY 1981

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
	Chowan			1981	Mike Williams Zackie Harrell, Henry Riddick
Eugenia Ware	Rutherford	Same	W	1981	Steven West Dewey Hennessee
Fred May	Pamlico	Robeson	W	1981	R. Ray Harris
Frank Green	Rockingham	Same	W	1981	No other applicants
J. M. Pittman	Avery	Wake	W	1980	Johnnie Hensley

[1] All were Extension agents before becoming chairman. Some transferred from one County to another after becoming chairman.

[Continued on following pages]

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
John Reeves	Clay	Cherokee	W	1980	No other applicants
Alvin M. Stanford	Cabarrus	Priv. Industry	W	1980	William Triplett
James R. Mabe	McDowell	Same	W	1980	No other applicants
Donald Cobb	Vance	Granville	W	1980	Phyllis Stainback Fred Belfield
James Carey	Ashe	Cumberland	W	1980	Robert F. Breland Dana Tugman
John W. Dunham	Hertford	Bladen	W	1980	James Daughtry James E. Wright
W.R. Jester	Perquimans	Tyrrell	W	1980	Henry C. Riddick
Hover Royals	Anson	Same	B	1980	No other applicants
James Stephenson	Nash	Vance	W	1980	Fred Belfield Bryan Page
George Biddix	Buncombe	Rutherford	W	1980	J.B. Reeves Reagon Ammons
B.F. Spencer	Cleveland	Same	W	1979	No other applicants

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
John Richardson	Robeson	Same	W	1979	M.K. Dennis
John Hall	Lee	Same	W	1979	Fay T. Donneli Clarence J. Cameron
M.C. Small	Jones	Caswell	W	1979	Charles Hammon Fletcher Barber
Bill Rogister	Northampton	Hertford	W	1979	No other applicants
James D. Stephenson	Vance	Nash	W	1979-80	Phyllis Stainback Marshall Bowden
C.E. Lewis	New Hanover	State Specialist	W	1979	Thomas Dail Harvey Morris James E. Warren
L.N. Whitt	Caswell	Same	W	1979	Donna Pointer
Reginald Piland	Pamlico	Same	W	1979-80	No other applicants
L.C. Cooper	Warren	Same	B	1979	George Koonce Emily Ballinger
Dan Baucom	Onslow	Same	W	1979	Charles E. Hammond Chase Padgett

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
M.K. Dennis	Bladen	Same	W	1979	Harvey Morris
C.E. Hammond	Moore	Area Agent	W	1979	Tom Colson Paul Seabolt Clarence Cameron
W.E. Mainous	Davie	Forsyth	W	1979	Judge A. Pierce Ronnie Thompson
James Ray	Yancey	Cherokee Reservation	W	1979	Carlos Bickford Johnny G. Hensley
J.D. Carroll	Forsyth	Guilford	W	1979	W.E. Mainous
Talmadge Baker	Randolph	Moore	W	1979	Dick Petersen Drue Finette Richard Freeman Doug Young Rodney Haines
Wesley Townsend	Wayne	Same	W	1978	John H. Wynne William Lamm

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
James H. Caudill	Rowan	Same	W	1978	Rodney Haines
Lois Britt	Duplin	Same	W	1978	Robert Swain S.B. Wilson
Leroy James	Pitt	Same	B	1978	No other applicants
O.R. Ammons	Polk	Burke	W	1977	Carlos P. Bickford Judy M. Groff
W.J. Griffin	Bertie	Perquimans	W	1977	No other applicants
David Terrell	Mitchell	Same	W	1977	No other applicants
Helen Dosier	Alleghany	Same	W	1977	William Fowler Walden M. Hearn
Frank Baker	Granville	Wayne	W	1977	I.W. Murfee Dorothy Wilkinson
Gene Brewer	Watauga	Same	W	1977	No other applicants
C.H. Jernigan	Wilson	Same	W	1977	Frank Baker
R.A. Hayes	Greene	Wilson	W	1977	No other applicants
B.T. McNeill	Cumberland	Same	B	1976	No other applicants

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
David Choate	Lincoln	Same	W	1976	A.L. Smith Howard Waynick
V.B. Lynn	Wake	Same	W	1976	No other applicants
M.C. Howell	Union	Same	W	1976	P.E. Bazemore
R.M. Coleman	Brunswick	Same	W	1976	Dan E. Baucom M.K. Dennis
C.D. Bunn	Swain	Same	W	1976	Roger Hyatt
Robert R. Hyatt	Transylvania	Buncombe	W	1976	Roger Hyatt James H. Ray Dennis Winters Linda Best
E.E. Bishop	Cabarrus	Same	W	1976-80	J.P. Bowles
Bruce Woodard	Johnston	Cumberland	W	1976	David Stanaland Frank Baker Harold Lloyd Peter Westerbeck H.F. Palmer James Stephenson Leroy James

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
Millis B. Wright	Alamance	Robeson	W	1975	Richard J. Freeman
D.R. Burnette	Buncombe	4-H Specialist	W	1975-80	C.P. Bickford J.D. Brooks Nancy Stancil Robert Hyatt
J.F. Simpson	Stanly	Same	W	1975	Carol Baker Ray Kiser Fredrick J. Rivers
W.F. Walker	Pender	Same	W	1975	Dan E. Baucom J.G. Richardson John Wynne
Keeneth Vaughn	Iredell	Chatham	W	1975	D.O. Ivey S.D. Little Jack Smith, Jr.
M.C. Griffin	Beaufort	Duplin	W	1975	H.C. Riddick Jack Cullipher

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					R.M. Pilch W.M. Hearn Gordon Sawyer Steve Warrick Gaylon Ambrose Harvey Morris
F.J. Rivers	Person	Tyrrell	W	1975	M.B. Wright
F.S. Volvia	Tyrrell	Same	W	1975	No other applicants
T.S. Godwin	Wayne	Same	W	1975-78	Frank Baker William Lamm Wesley Towsend B.T. McNeill
L.L. Allen	Martin	Nash	W	1975	R.M.K. Edwards C.J. Cameron P.C. Bryant
G.D. McCullen	Columbus	Same	W	1975	M.K. Dennis Harold Lloyd

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					Harvey Morris John Spaulding
Donald Baker	Pasquotank	Columbus	W	1974	W.M. Hearn, Sr. J.R. Vaughn Harvey Morris Victor Lynn
H.L. Miller	Burke	McDowell	W	1974	R.M. Bowden Roger Hyatt Robert Hyatt
B.G. Westbrook	Alexander	Same	W	1974	Roger Hyatt Kenneth Patterson
M.C. Small	Caswell	Currituck	W	1974-79	
E.J. Long	Northampton	Same	W	1974-75	Fred Belfield Doug Eason
H.M. Ramseur	Wilkes	Alexander	W	1974	M.B. Wright
W.C. Richardson	Watauga	Same	W	1974-77	Gene R. Brewer

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					Rodney Haines
					Agnes A. Greene
					Henry B. Hagwood
					Harold Lloyd
					C.D. Bunn
					James W. Gentry
					Patrick Guyer
Alvin Stanford	Iredell	Priv. Industry	W	1973-75	D.O. Ivey
					H.M. Stoney
					H.W. Myers
Herman McCall	Haywood	Same	W	1973	H. Leslier Miller
W.S. Lamm	Lenoir	Wayne	W	1973	John H. Wynne
					W.N. Pagton
					G.E. McDaniel
					R.L. Strough
					Walter C. Johnson
					T.S. Godwin

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
					C.H. Jernigan F.H. Baker
Walter Bowers	Montgomery	Same	W	1973	No other applicants
Jack Barnes	Stokes	Same	W	1973	M.B. Wright C.J. Cameron
Edwin Nolley	Catawba	Same	W	1972	
W.C. Holtzman	Davidson	Forsyth	W	1972	Wade Johnson Lathan Smith
Fred Rivers	Tyrrell	Industry	W	1971-75	
William Shackelford	Nash	Same	W	1971-80	
Carl Hodges	Durham	Same	B	1971	
James Goff	Harnett	Same	W	1971	
Zackie Harrell	Gates	Same	W	1970	C.M. Grimes
Phil Haas	Mecklenburg	Same	W	1970	
Joe Perry	Edgecombe	Same	W	1970	

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
Earl Wise	Madison	Same	W	1970	No other applicants
Robert Rollins	Macon	Same	W	1970	George Conrad Earle Wise
Walter Johnson	Greene	Same	W	1970-77	
Talmadge Baker	Moore	Ashe	W	1970-79	
Aubrey Hardee	Granville	Same	W	1970-77	
Richard Bryant	Perquimans	Same	W	1970-79	
Jerry Purser	Transylvania	Durham	W	1970-76	
William Bledsoe	Yancey	Buncombe	W	1970-79	
Grover Westmoreland	Henderson	Dairy Specialist	W	1970	No other applicants
W.W. Avery	Avery	Same	W	1970-80	Leslie Miller Woodie Richardson
Robert Wesson	Montgomery	Same	W	1970-73	
Raymond Thompson	Chowan	Same	W	1970-81	
Ed Simpson	Craven	Same	W	1970	

Name[1]	County	Co. Before Becoming Chairman	Race	Year Appointed Chairman	Applicants
Samuel Young	Yadkin	Same	W	1969	No other applicants
Edwin Yancey	Pitt	Johnston	W	1969-78	
Gordon Sawyer	Camden	Halifax	W	1969	
Enos Rogister	Hertford	Camden	W	1969-79	
William Corbin	Alleghany	West Virginia	W	3/69-8/69	No other applicants
Roger Murdock	Alleghany	Virginia Ext.	W	8/69-76	No other applicants
Ebert Pierce	Orange	Yadkin	W	1969	
John Stacy	Union	Catawba	W	1969-76	
Bruce Woodard	Cumberland	Wake	W	1969-76	
Henry Ramseur	Alexander	Industry	W	1968-74	No other applicants
James Bunce	Carterett	Same	W	1968	
Laverne Hardage	Warren	Same	W	1968-79	
John Crawford	Guilford	Rutherford	W	1968	
Murray Goodwin	Tyrrell	Same	W	1968-71	

GOVERNMENT EXHIBIT 74

PROMOTIONS TO COUNTY CHAIRMAN
(1962-1981)

Year	White	Black	Indian	Total
1962-63	103	0	0	103
1964	1	0	0	1
1965	6	0	0	6
1966	5	0	0	5
1967	5	0	0	5
1968	6	0	0	6
1969	9	0	0	9
1970	16	0	0	16
1971	3	1	0	4
1972	2	0	0	2
1973	5	0	0	5
1974	7	0	0	7
1975	11	0	0	11
1976	8	1	0	9
1977	8	0	0	8
1978	3	1	0	4
1979	16	1	0	17
1980	10	1	0	11
May 1981	3	0	0	3
TOTAL	227	5	0	232

Source: NCAES Personnel Directories; Personal Data Cards; Defendants' Response to Plaintiff-Intervenor's Letter of April 9, 1981.

GOVERNMENT EXHIBIT 98

ANALYSIS OF 1971 EFFORT TO EQUALIZE SALARIES OF BLACKS AND WHITES

County Professional Positions	1970 Average Salary		1971 Average Salary		Percent Change in Avg. Salary (1970-71)		Average Salary Difference (W-B)	
	White	Black	White	Black	White	Black	1970	1971
County Chairman	12,986	*	13,637	13,375	5.0	*	*	262
Agricultural Extension Agent	10,871	10,439	11,494	11,147	5.7	6.8	432	347
Associate AEA	9,876	8,956	10,240	9,558	3.7	6.7	920	682
Assistant AEA	8,796	8,671	9,126	8,505	3.8	– 1.9	125	621
Home Economics Agent	9,893	9,802	10,599	10,492	7.1	7.0	96	107
Associate HEA	8,553	8,195	9,146	9,040	6.9	10.3	358	106
Assistant HEA	7,852	7,796	8,240	8,113	4.9	4.1	56	127
Total	11,005	9,517	11,639	10,120	5.8	6.3	1,488	1,519

GOVERNMENT EXHIBIT 157 (EXCERPT)
[HANDWRITTEN MEMORANDUM]

* * * * *

7. Obviously one of the areas where we'll be checked is on salary – Easy to measure & at least see if there appears to be any. Already had to supply salary figures on state staffs for all personnel – identifying race, sex, tenure, highest degree, etc.

8. Believe you'd agree our salaries for women & non-white men on average are lower – Our figures verify – Due to several factors.

– The competitive market – This is not acceptable as a reason though.
– Tradition – Not just in Ext.
– Less county support for non-white positions.

9. Don't believe there's any reason to spend lot of time rationalizing why it has or has not been & whether it's right or wrong. This is past & we can't do a whole lot about it – We can & must for the future.

10. For county personnel we – AES – are not totally at fault & AES can't correct the problem alone. Counties must share in this & where they have been low they must help correct their portion.

11. Review differences in salary between men & women by titles – *Don't use actual figures of salary averages.*

12. Review summary of county support by race & sex – Have supported non-white positions about 5-6% lower.

13. Was our feeling that would be to our advantage – plus simply the right thing to do – to move to make some salary adjustments as quickly as pos. & preferably before our plan went into Washington.

14. Review what's happened in Michigan & Illinois.

15. We have "squirrelled" a little money for past year and after *much* effort persuaded budget people downtown to let us use it—much of which would have been lost July 1—to make some salary adjustments. Reduced vacant positions used almost all our reserves & about every uncommitted dollar we [had?]. Originally proposed to give adjustment & anticipated July raise at same time. After PA-1's were typed they got cold feet & said we couldn't give July raises because weren't assurred [sic] there'd be any. Had to go back & adjust on more.

16. Asked Dist. Chs. to give us a figure of adjustment needed on women & non-white men positions in their District & the portion that State should assume. As best we could [,] we've followed these recommendations.

17. Majority are $500-$700 range—County should probably do $300-$400 also—for total of $800-$1100.

18. No one gets less than $500, I believe. No one will get less than $200 July—assuming 5% increase.

19. This will relieve pressure on our other salary increase money—Not that this will affect raise these people will get July 1 but will mean we will not have to take regular salary increase money & use to make these adjustments. Were never able to [*sic*] this on non-white positions & thru years we have used a heavier than average amount to try to correct some of these inequities. So this is really going to help every other member of the Ext. staff.

20. You should call this to attention of commissioners. If complaint is filed they will be included for their portion of the salary.

21. Have not corrected all our problems. Are going to try to do a few more July 1.

* * * * *

GOVERNMENT EXHIBIT 173

UNITED STATES DEPARTMENT OF
AGRICULTURE
SCIENCE AND EDUCATION ADMINISTRATION

Office of the Deputy Director for Extension
Washington, D.C. 20250

May 9, 1978

SUBJECT: Trends in State 4-H Affirmative Action Programs

TO: Assistant Directors and State Leaders, 4-H-Youth

Extension 4-H staff and volunteer leaders are to be commended for an impressive record in expanding 4-H program opportunities for minority youth. Ten years ago (1968) national 4-H enrollments totaled 2,297,760 of which *356,021* were minority youth. The 1977 enrollments of youth in 4-H clubs, 4-H special interest groups and 4-H EFNEP totaled 4,918,231 of which *1,218,011* were minority youth—well over three times as many as in 1968.

The percentage of youth participants from minority racial-ethnic groups attending Extension 4-H conducted camps increased from 19.5% in 1972 to 22.5% in 1977. Nationwide, more than 60% of the camp sessions involved youth of more than one racial-ethnic group. It is essential that continued efforts to made [sic] to conduct all 4-H camps in a non-discriminatory manner.

More than 10,000 additional 4-H volunteers from minority groups served in 1977 than served in 1972 with 4-H clubs and 4-H special interest groups. Additional minority volunteers assisted 4-H EFNEP.

The single most vulnerable area in assessing the progress of State 4-H affirmative action programs is the high number of 4-H clubs and 4-H special interest groups in

mixed communities which have youth of only one racial-ethnic group. Approximately one-half of the States each have more than 500 such units.

We suggest that you identify the counties in your State where there are such 4-H units and counsel with county staffs. Many counties having only a few minority families have identified 4-H program service areas or community boundaries of such size as to cover major portions of an entire county—sometimes the whole county. In such cases all of the 4-H clubs in such areas or county are considered to be in a mixed race area. It may be appropriate in such instances for staff working with the County 4-H Expansion and Review Committees to review, and if desirable, redraw the boundaries. When this is done, record of the changes and reasons for them should be on file in the county office.

We are enclosing a copy of the trend summary for your State from 1968 through 1978. You may find this helpful as you work with counties on 4-H affirmative action in the months ahead.

Once again, you and members of your staff are to be commended on the progress during the past 10 years.

Sincerely,

E. DEAN VAUGHAN
4-H—Youth
Enclosure
4-H-30 (5-78)

State NORTH CAROLINA

NUMBERS AND PERCENTAGES OF ENROLLMENTS IN 4-H OF YOUTH FROM MINORITY RACIAL-ETHNIC GROUPS

Enrollments in 4-H Clubs and 4-H Special Interest Groups

Year	Total	Youth From Minority Racial-Ethnic Groups	Percent of 4-H Enrollment From Minority Groups
1968	NO REPORT	NO REPORT	NO REPORT
1969	54,654	21,862	40.0
1970	56,926	19,725	34.7
1971	65,139	22,119	34.0
1972	69,307	22,964	33.1
1973	81,834	27,721	33.9
1974	95,589	36,522	38.2
1975	90,640	33,491	36.9
1976	93,408	33,262	35.6
1977	97,954	35,834	36.6

Enrollments of Youth in 4-H EFNEP (1973 First Year Racial-Ethnic Data Avail.)

1973	45,646	29,337	64.3
1974	41,259	26,893	65.2
1975	39,576	27,681	69.9
1976	28,893	20,111	69.6
1977	27,725	18,794	67.8

Total 4-H Enrollments in 4-H Clubs, 4-H Special Interest Groups, 4-H EFNEP

1973	127,490	57,058	44.8
1974	136,848	63,415	46.3
1975	130,216	61,172	47.0
1976	122,301	53,373	43.6
1977	125,679	54,628	43.5

State NORTH CAROLINA

NUMBERS OF 4-H UNITS—4-H CLUBS AND 4-H SPECIAL INTEREST GROUPS—BY TYPES OF COMMUNITY AND PERCENTS OF 4-H UNITS IN MIXED COMMUNITIES WHICH ARE INTEGRATED

Year	Total Number of 4-H Units	Number of 4-H Units Not In Mixed Communities	Number of Integrated 4-H Units—In Mixed Communities	Number of 4-H Units Not Integrated—In Mixed Communities	Percent of 4-H Units In Mixed Communities Which Are Integrated
1972	2,587	1,109	586	892	39.6
1973	2,857	1,122	771	964	44.4
1974	3,182	1,151	1,017	1,014	50.0
1975	3,255	1,241	1,108	906	55.0
1976	3,298	1,085	1,260	953	56.9
1977	3,068	1,028	1,142	898	56.0

YOUTH ATTENDING EXTENSION 4-H CONDUCTED CAMP SESSIONS

Year	Total Youth Attending	Minority Youth	Percent Minority of Total Attending
1972	13,171	5,598	42.5
1973	17,284	8,367	48.4
1974	22,511	11,719	52.1
1975	22,566	12,193	54.0
1976	19,514	8,487	43.5
1977	18,427	7,694	41.8

GOVERNMENT EXHIBIT 182 (EXCERPTS)

* * * * *

1974 CIVIL RIGHTS INITIATIVES FOR DISCUSSION AT MEETING ON APRIL 5, 1974

* * * * *

3. New Homemaker and 4-H Clubs—

The policy is that no new uniracial clubs are permitted in biracial communities unless it can be shown that all reasonable efforts have been made to organize the club on an integrated basis. The agent working to organize the club will identify the geographic area from which the membership is expected to be drawn. Next, the racial make-up of the population in that area will be estimated. If there is a biracial composition to this population (one race less than 90 percent of the total) the club membership must be integrated or documented evidence shown that sincere but unsuccessful efforts were made to have an integrated membership. The documented evidence will be a statement by the agent showing: (a) that ten (10) individuals of the "other" race were given personal invitations to participate (including descriptions of the activities of the proposed club), (b) the names and addresses of these individuals, (c) the name of the person issuing the invitation to each person and (d) the date issued. The spirit of the policy on "invitations to join" is that it be personal (one-to-one) and not an announcement in the press or at a meeting, although this method may be used to supplement the personal invitation. In addition, the new club officers will certify the openness of the club to all races.

* * * * *

7. Altering the Nature of Segregated Clubs—

A program will be undertaken immediately to achieve a voluntary desegregation of all uniracial clubs in biracial communities. The program will involve members of the

administration and supervisory staff working with county staffs and the lay leadership in each county. The impact of the USDA Affirmative Action Program and the Alabama and Mississippi decisions will be explained. Voluntary desegregation will be requested. Multiple approaches will be suggested, such as: (a) combining clubs, (b) recruiting from the "other" race in the community, (c) joint meetings of clubs for educational programs, (d) restructuring two or more clubs in a given community, (e) finding "neutral" meeting places, (f) obtaining biracial teams of lay leaders to reinforce the efforts of the professional staffs to interpret the need for change and others.

Note: This is deleted from the 1974 Civil Rights Initiatives

GOVERNMENT EXHIBIT 184

AGRICULTURAL EXTENSION SERVICE

NORTH CAROLINA STATE UNIVERSITY
AT RALEIGH

SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Agriculture Extension Service
Office of the Director
Box 5157, Zip 27607

May 3, 1974

TO: District Supervisors

Attached is a statement of civil rights initiatives which should be undertaken according to schedules included. These steps are those which have been decided upon following thorough discussions of our present status and needs. I appreciate the careful attention you have given to the development of this program and I am sure that you will carry forward in the same spirit with the responsibilities assigned to you in this statement. In doing so, I hope that you will make use of the services of those of us in the administration as appropriate.

Very truly yours,

George Hyatt, Jr.
Associate Dean and Director

GH:ms
Attachment
cc: Administration
Specialists in Charge

1974 CIVIL RIGHTS INITIATIVES

1. County 4-H Councils—

The status of the county councils should be reexamined. The 4-H staff will specify what is the appropriate representation on the Council. In those counties where the councils are inactive, they should be reactivated immediately. This should be accomplished by July 1, 1974, by the district teams. These counties will need assistance in making the council a meaningful entity. This will require more time but should be accomplished by June 30, 1975, by the combined effort of the district teams and the 4-H staff.

2. Functional Arrangement of Office Space, Telephone Numbers, Post Office Boxes, Mailing Lists and Assignment of Secretarial Work without Regard to Race—

Instances of the existence of non-functional arrangements should be eliminated by the district teams by July 1, 1974.

3. New Homemaker and 4-H Clubs—

The leaders and/or officers of all new Homemaker and 4-H Clubs will certify in writing that the club is open to all people without regard to race, color or national origin. In addition, the organization of the club will be announced to the public by radio and newspapers, including the approximate location or area served by the club, its purposes and the fact that it is open to all people without regard to race, color or national origin.

4. Work across Racial Lines—

It continues to be the policy of the North Carolina Agricultural Extension Service that our staff provides services to people without regard to race, color or national origin. Practices which impede the full implementation of this policy should be eliminated.

a. *Agents meeting with 4-H and Homemaker Clubs*—

District teams will ascertain by July 1, 1974, that agents are meeting with clubs without regard to race. Two agents (one White, one Black) meeting with a given club might be

a way to achieve this goal but will be viewed only as a means to the end of agents meeting with clubs in subject or program areas without regard to race.

b. *Leader recruitment and training*—

Leader recruitment and training will be done without regard to race by July 1, 1974. The affirmative requirements for dealing with the races should be a part of the initial training of leaders. This should be implemented during 1974 by the district teams.

c. *Referral of contacts*—

County chairmen will take steps to be sure that people who call at the county office by telephone or in person are referred to the agent whose areas of assignment are appropriate to the questions the caller has. This will require extensive discussion in staff meetings and special training for the secretarial staff. The district teams will see that this is accomplished in 1974.

d. *Specialists' contacts with county staffs*—

The administration will continue efforts to eliminate instances of specialists violating the spirit of assigned areas of responsibility. This was discussed at the Specialist-in-Charge meeting on April 26, 1974, and will be discussed again with all specialists at the meeting of state level people on May 24, 1974. Follow-up by the administration will continue with specialists who commit acts, intentional or otherwise, which violate the spirit of the assigned areas of county staff members.

e. *Pattern of contacts by staff*—

Each county staff member will analyze his or her pattern of contacts by race based on SEMIS. This will be compared with the potential clientele for the relevant program areas. The county and district chairmen will make a review of contacts by race a part of the annual performance review process beginning in 1974-75.

5. Reaching Minority Race People—

Each county shall analyze the extent to which they as a total staff are reaching Blacks and Indians in the latest

period for which SEMIS data is available (July-December 1973 or July 1973-June 1974) as compared with the total potential clientele for each program area (Agriculture, Home Economics, 4-H, Community Resource Development and Environmental Quality). The county staff will estimate the racial mix for each program area based on county population data, numbers of farmers, etc. In counties with large urban areas, different weights might be put on the urban population, depending on the extent of urban programming. Estimates will be added for program aides who do not report on SEMIS. For those program areas in which contacts by race are less than 80 percent of the potential clientele percentage (for example, less than 8 percent if the minority race potential is 10 percent or less than 32 percent if the minority race potential is 40 percent), a plan will be developed to increase the percentage of Blacks or Indians contacted. This plan will state (a) what will be done, (b) who will do it, (c) when it will be done, and (d) the specific result expected to be achieved. The 80 percent variance should not be considered a goal. The goal shall be to serve minority race people at least in relation to their percentage of the potiential clientele. This principle should be considered in setting the goal expected in (d) above. District teams will review the county analyses before December 31, 1974, and anually thereafter.

6. Judging State and District Demonstrations—

Beginning in 1974 and continuing thereafter 25 percent of the judges for district and state demonstrations will be from minority races. The responsibility for this rests primarily with the specialist responsible for administering the demonstration. Each such specialist shall comply with the 25 percent requirement by combining the judging teams for the districts with that for the state and computing the percentage by race. However, the state judging team should include one or more persons from minority races. The 4-H office will assist specialists in meeting this requirement.

GOVERNMENT EXHIBIT 191

NORTH CAROLINA STATE UNIVERSITY
SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Agricultural Extension Service
Office of the Director
Box 5157 Zip 27607

March 31, 1977

TO: D. G. Harwood, Jr.
Donald L. Stormer

FROM: Chester D. Black

At the last District Chairmen's conference we discussed briefly the Affirmative Action requirements for organization of new 4-H and Extension Homemakers clubs. Following this conference Dr. Stormer shared his desired documentation to be followed in the formation of new 4-H clubs. Almost simultaneously Mrs. Meldau brought to our attention the Civil Rights Initiatives shared with our staff in 1974. Under the heading of New Homemaker and 4-H Clubs there are listed the requirements which were given to the agents at that time.

Since we have a discrepancy between the two documentations currently requested, I would appreciate you gentlemen assisting our staff in an interpretation of what should be the current status regarding Affirmative Action initiatives being taken by our field staff in the formation of 4-H and Homemaker clubs.

CDB:ms

GOVERNMENT EXHIBIT 192

April 4, 1977

Dr. Chester D. Black
110 Ricks Hall
NCSU Campus

Dear Dr. Black:

In your memorandum of March 31 you asked the two of us to interpret the current status of affirmative action initiatives to be followed by field staff in the formation of 4-H and Homemaker clubs.

At a meeting on January 6 of Mr. Howard Manning, Dr. Hyatt, Dr. Blalock, Mr. Dodson and Mr. Harwood, acting on the advice of counsel, Dr. Hyatt stated that it shall be the policy of the N.C. Agricultural Extension Service to take necessary steps to avoid all discrimination in delivery of services, but that unnecessary record-keeping, delineation of geographical boundaries, physical counting of population in a community and other affirmative action chores which require tremendous amounts of staff time should be avoided. At that time it was noted that a formal, complete affirmative action plan would require an estimated $6-$8 million in staff time. Also, counsel advised that a court order resulting from the civil rights suit would likely require steps in addition to any affirmative action measures then being implemented anyway.

In view of this decision, knowing that the N.C. Agricultural Extension Service is essentially "sheltered" from discrimination issues until the pending litigation is settled, and yet because our understanding is that violation of the various civil rights laws can be charged eventually against any employee who cannot document compliance, we offer the following suggestions:

1. *If we are asked what affirmative action requires*[1] in formation of new 4-H and Homemaker clubs, then the correct response is to "make reasonable efforts" to integrate these units, basically as defined in Dr. Stormer's memo of March 25, 1977.

2. *If we are asked what the policy of the North Carolina Agricultural Extension Service is with respect to affirmative action,* then reference must be made to the "1974 Civil Rights Initiatives" which were agreed upon by Administration and which were attached to Mrs. Meldau's memo of March 29, 1977.

Sincerely,

Donald L. Stormer
Assistant Director, 4-H

D. G. Harwood, Jr.
Assistant Director,
Administration and Special
Programs

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[1] See "Title 9, Equal Opportunity Administrative Regulations," USDA, November 18, 1976.

GOVERNMENT EXHIBIT 193

AGRICULTURAL EXTENSION SERVICE

NORTH CAROLINA STATE UNIVERSITY
AT RALEIGH

SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Office of the Director
Box 5157, Zip 27607

April 18, 1978

TO: All County Extension Chairmen

SUBJECT: Meeting Structure for Extension Homemakers

The new Extension Homemaker meeting structure, approved by the Extension Homemakers State Organization, is now policy for the N. C. Agricultural Extension Service and the new meeting structure will begin on October 1, 1978. Details of this new meeting arrangement were discussed during March at district level meetings of County Chairmen, Home Economics Agents with Extension Homemaker liaison responsibilities, and presidents of Extension Homemaker County Councils.

Basically, the restructuring will result in the following Extension Homemaker meeting schedule:

1. Three area meetings with lessons conducted by Extension Home Economists during three quarters of the year.
2. One meeting during a quarter of the year when the Extension Home Economist will meet with each club.
3. Eight local Extension Homemaker Club meetings with lessons presented by volunteer leaders, with prior training by appropriate Home Economics Agent.

In order to document the procedures for implementing this policy, please ask the Extension Home Economist with liaison for Extension Homemakers, working with the

District Program Leader, Home Economics, to submit to Dr. Eloise Cofer by September 1, 1978, the following documents:

1. County map, identifying location of clubs, location of area meeting boundaries.

2. Listing of club membership by area, indicating race of members and race of potiential clientele.

3. Meeting schedule planned, listing program features, dates, locations.

4. Copies of any public notices of new meeting schedule (newsletters, news articles, radio scripts).

5. Narrative statement of procedures followed in restructuring Extension Homemakers meetings, identifying any planning committees with respect to race of members.

I am confident that this new policy will result in increased Extension Homemakers membership, better meetings, more efficient use of agents' time and closer compliance with affirmative action regulations.

Thank you.

Very truly yours,

George Hyatt, Jr.
Associate Dean and Director

cc: Extension Administration
District Chairmen
District Program Leaders
Home Economics Specialists-in-Charge

GOVERNMENT EXHIBIT 194

April 25, 1978

Mr. Howard Manning, Sr.
Manning, Fulton & Skinner
P.O. Box 1150
Raleigh, N.C. 27602

Dear Mr. Manning:

The attached copy of a letter from Dr. George Hyatt outlines a new policy for the Extension Homemakers meeting structure as conducted by the Extension Home Economists of the N.C. Agricultural Extension Service. This arrangement has implications for civil rights, and we have tried to inform County Extension Chairmen, Extension Home Economists and Extension Homemaker officers of the need for grouping Homemaker clubs according to township boundaries so that race of members and race of potential clientele can be documented. There are some other very good reasons why the Extension Homemaker meeting structure is being changed, but I did want you to know what we are doing because of the implications for civil rights.

Sincerely yours,

D. G. Harwood, Jr.
Assistant Director

Enclosures

GOVERNMENT EXHIBIT 195

September 4, 1979

TO: Dr. T. C. Blalock

FROM: D. G. Harwood, Jr.

You will recall that as long as Dr. Hyatt was Director of the N.C. Agricultural Extension Service, he refused to allow implementation of one of the "all reasonable effort" guidelines suggested in "Guidelines for Identification of Potential Recipients in State Cooperative Extension Service Programs." That provision was to "Make personal contact annually with minority group members to inform them of programs and to encourage their active participation." Dr. Hyatt agreed to allow implementation of "use of mailing lists for minority group members to receive information on a continuing basis, extend invitations through letters, newspapers and so forth to minority group members to attend and participate, direct information on programs and activities to sources of business and social contacts of minority group members, identify and utilize various mass media outlets which serve to disseminate information to minority group members, and maintain documentation of these efforts to involve minority group members."

I understand that Extension Homemakers, with assistance from Extension Home Economics Agents, will shortly be launching a membership drive throughout the state to increase greatly the numbers of Extension Homemakers. I am wondering how you feel about now implementing the provision regarding personal contact with minority group members to inform them of programs and to encourage their active participation in Extension Homemaker and 4-H activities. I personally feel that this next step will be required to satisfactorily comply with

affirmative action mandates. It may be that the personal contacts could be made by Extension Homemakers rather than by Home Economists. However, you yourself realize that often participation is not encouraged through simply notifying minorities through mass media outlets. I recognize that this implementation would require some additional time and travel. However, since this contact could be made over a period of a year, it seems to me that the contacts could be made in connection with other trips out in the county and would not require an undue amount of time and travel. Also, it could only be implemented in areas where new clubs were being formed, so this restriction alone could keep the time and travel within manageable levels.

I will await your instructions in this regard.

GOVERNMENT EXHIBIT 198

NORTH CAROLINA STATE UNIVERSITY SCHOOL OF AGRICULTURE AND LIFE SERVICES

Agricultural Extension Service
Office of the Director
Box 5157 Zip 27650

November 14, 1979

Mr. Howard E. Manning, Sr.
Manning, Fulton & Skinner
P. O. Box 1150
Raleigh, NC 27602

Dear Mr. Manning:

Thank you for your letter of November 7, 1979, enclosing documents which you recently filed in reference to Bazemore vs. N. C. Agricultural Extension Service (your file G-6778). On page 4 of the Defendant's Answer to Amended Complaint in Intervention and in paragraph 14 it is stated that the defendant Dr. George Hyatt, Jr., is the Director of the N. C. Agricultural Extension Service. You will recall that Dr. T. C. Blalock was named Director of the N. C. Agricultural Extension Service on July 1, 1978. I don't know whether this makes any difference or not and whether or not this should be corrected, but since you mention in paragraph 13 on page 3 that John T. Caldwell has not been Chancellor of N.C. State University for several years, I thought I should bring this oversight to your attention.

I will be contacting you again in a few days in order to ascertain whether or not you feel certain publication distribution and implementation of all reasonable efforts is in the best interest of the N.C. Agricultural Extension Service, given the current state of the Civil Action No. 2879.

Sincerely,

D.G. Harwood, Jr.
Assistant Director,
Agriculture and
Special Programs

cc: Dr. Clauston Jenkins
Dr. T. C. Blalock

GOVERNMENT EXHIBIT 199

November 15, 1979

Mr. Howard Manning, Sr.
Manning, Fulton & Skinner
P. O. Box 1150
Raleigh, NC 27602

Dear Mr. Manning:

At a recent meeting of our Administrative Council, the Administration of the North Carolina Agricultural Extension Service voted to begin implementation of "all reasonable efforts" in delivery of Extension programs of this state, with particular emphasis on "personal visits by the county Extension staff member(s) to a representative number of defined potential recipients in the geographically defined area to encourage participation."

We do not want to take this step if it will in any way compromise our position in the pending civil action against our organization. Do you feel that our actions on "all reasonable efforts" would be detrimental to our case at this time?

Also, enclosed is a copy of *Strengthening 4-H Programs Through Affirmative Action* (Discussion of "All Reasonable Efforts" on pages 20-23). Would you advise against our distributing this publication to each county office?

Thanks for your help.

Sincerely,

D. G. Harwood, Jr.
Assistant Director, Agriculture
and Special Programs

cc: Dr. T. C. Blalock
Dr. Clauston Jenkins
Mr. Millard Rich

GOVERNMENT EXHIBIT 200 (EXCERPTS)

* * * * *

STRENGTHENING 4-H PROGRAMS THROUGH AFFIRMATIVE ACTION

* * * * *

SECTION V/ "All Reasonable Efforts"

The philosophy of taking educational program services to the unserved by seeking them out and providing them with program information, assistance and benefits is germane to the issues presented in this section. In spite of the fact that the Cooperative Extension Service has successfully served its clientele through various educational programs for over 60 years, the question of reaching the unreached is particularly significant to the nonparticipation problem of minority group members.

The question of involvement and increased participation of minorities in Extension educational programs has led to suggested practical steps which can be taken to meet both the 4-H program and affirmative action program requirements. The intent in the application of "all reasonable efforts" is a program management tool. Efforts outlined here will result in an informed public and encourage them to participate.

Question 40: What is meant by "all reasonable efforts" with respect to the 4-H program?

Answer: The term "all reasonable efforts," as used in the Affirmative Action Plan, applies to organized Extension Homemaker Groups and 4-H Clubs. The *minimum reasonable* effort required by *county Extension staff members* includes all items listed as follows:

• Use of all available mass media, including radio, newspaper, and television, to inform potential recipients of the program and of opportunity to participate.

- Personal letters and circulars addressed to defined potential recipients inviting them to participate, including dates and places of meetings or other planned activity.
- Personal visits by the county Extension staff member(s) to a representative number of defined potential recipients in the geographically defined area to encourage participation.

State Extension Services may require additional steps to be taken such as encouraging volunteers to assist by involving potential recipients in opportunities to participate, but such additional steps *are not required* by USDA in meeting these requirements. If a State requires additional steps to be taken, then the State should be explicit and point out that such is a State requirement. (The greatest results will be obtained when these reasonable efforts are carried out in conjunction with upcoming or planned activities. An invitation extended in a vacuum, without some activity scheduled, will yield little motivation.

Question 41: Who is responsible for "all reasonable efforts" and what documentation is expected to show that these have been carried out?

Answer: The State Cooperative Extension Service, as the recipient agency to whom federal financial assistance is extended, is responsible and accountable for all civil rights matters in 4-H Clubs and the 4-H youth development program. Therefore, the Affirmative Action Plan specifically identifies the *county Extension staff* member(s) as those responsible for carrying out "all reasonable efforts." However, county Extension staff members may solicit the *voluntary assistance* of lay leaders, officers of clubs, etc., to carry out these efforts. In this latter case, the county Extension staff should provide procedures, materials and forms to lay leaders and others for recording and reporting to the county Extension office the "all reasonable efforts" which were carried out.

All activities conducted as a part of the 4-H youth development program which involve participation should be documented and available in the county files for review purposes. Insofar as "all reasonable efforts" are concerned, "if it isn't documented, it wasn't done."

Using "all reasonable efforts" for documentation purposes, the following records appear obvious:

Use of Available Mass Media

- Name of radio station(s) used; dates on which programs were personally presented; dates on which radio scripts were provided to the station for airing; copies of any radio scripts which were used with personal presentation.
- Name of TV station(s) used; dates on which programs were presented and dates aired, if different; copies of scripts, when used; copies of any scripts which were provided to the station(s).
- Name of newspapers; dates on which news articles were presented to papers and copies of articles presented for publishing; dates on which articles appeared in newspaper; clippings of such articles; date and identity of newspaper(s) which released article.

Personal Letters and Circulars

- Copies of such letters and circulars in the file.

Names of persons to whom such letters and circulars were sent.

Personal Visits

- Names and addresses of persons visited; dates of such visits; names of persons present during the visits.
- Resume of significant contents of visit and followup needed; and outcome of visit in terms of desire to participate or lack of interest; other important information thought desirable.

Question 42: What are the bases for determining if "all reasonable efforts" have been carried out?

Answer: Verify, through review of county office records, the documentation to ascertain the adequacy of the actions which were recorded, and evaluate the extent to which the "all reasonable efforts" were completed. County Extension staff should verify by occasional contact with those purported to have been communicated with. Monitoring of radio and TV airings as well as news releases serves as a useful criterion in evaluation.

Question 43: How do "all reasonable efforts" apply to established 4-H Clubs? To new 4-H Clubs?

Answer: The concept of "all reasonable efforts" and its criteria apply to all 4-H Clubs established presently in an ongoing county 4-H program. In organizing new 4-H Clubs in interracial communities, the "all reasonable efforts" must be carried out during the process of organizing. This process provides opportunity for youth of all races to become members. Only after the criteria of "all reasonable efforts" have been met may a new club be organized in interracial locales.

Such steps are simply good program development procedure.

Question 44: How often must "all reasonable efforts" be carried out?

Answer: After the "initial" efforts are completed (six months following acceptance of plan), a continuing plan of action based upon effective program planning procedures and an effective public information and communications program should be developed and implemented. A continuing plan should focus upon these 4-H situations where the initial efforts were unproductive. It should correlate the "all reasonable effort" requirements with the various program plans and strategies, including annual plans for Targeting of Minority Benefits.

Involve all public pronouncements of program participation opportunities through various mass media sources and outlets in keeping with the provisions of the public notification plan. Personal visits (by agent, leader, officers or others) to prospective minority members should be tied very closely to some planned program activity, perhaps unique to a club or several clubs where participation can occur almost immediately with appropriate followup plans by agents or leaders. A membership promotional program such as National 4-H Week or other appropriate observance which includes these and other efforts to attract membership can be effective instruments in meeting these requirements on a continuing basis.

Question 45: If there are ten (10) 4-H clubs in a delineated geographic area and very few of these clubs have interracial membership, but overall the clubs' membership represents the general makeup of the community, do these clubs meet affirmative action requirements?

Answer: There may be situations in high density urban areas when this question could be answered affirmatively. Generally, the above situation as described does not meet the interracial membership requirements of each club in a geographic area, particularly where minority youth are scattered throughout the community. (See Standard 1, Action Required, 1, b and c, pp. 34 and 35 of the Affirmative Action Plan.)

Each of those clubs whose membership is of one race and serving an interracial community must comply with the "all reasonable efforts" to integrate its membership before it can meet the affirmative action requirements.

* * * * *

Question 59: In what types of circumstances must Extension withdraw its services from a 4-H Club; the 4-H program; or a total county 4-H program?

Answer: Legally speaking, any circumstance which violates regulations for the administration of Title VI of the Civil Rights Act of 1964 can be grounds for the termination of services by the Cooperative Extension Service. The following situations are examples only of the range of possibilities. Any organization with whom Extension works, including a 4-H Club, which discriminates and/or restricts membership and participation or provides services differently or in a different manner, or segregates, based on race, color or national origin, are grounds for removal of services by Extension.

Any 4-H Club whose membership is of one race and serving an interracial community or area must make "all reasonable efforts" to integrate the membership. Service to such clubs must be terminated if the membership remains of one race and "all reasonable efforts" are not carried out. Similar circumstances would precipitate this same action for new clubs being organized.

Termination of services may occur on a county basis if the 4-H program in that county is conducted in a discriminatory manner. The conduct of educational activities and events which are, or have the effect of being, segregated, restricted, provided differently or in a different manner, or which deny participation based upon race, color or national origin, may cause the termination of services.

In a county where the practice of discrimination is severe and voluntary compliance with Title VI of the Civil Rights Act of 1964 is not possible, may be sufficient grounds for removal of the total Extension program from that county.

Non-compliance with the provisions of the affirmative action plan, or any one of its provisions, may serve as the basis for the termination of services.

* * * * *

GOVERNMENT EXHIBIT 201

NORTH CAROLINA STATE UNIVERSITY
SCHOOL OF AGRICULTURE AND LIFE SCIENCES

Agricultural Extension Service
Office of the Director
Box 5157 Zip 27650

February 29, 1980

TO: Dr. T. C. Blalock

FROM: D. G. Harwood, Jr.

Yesterday I was finally able to talk at length by telephone with Mr. Howard Manning, Sr., regarding our proposal to implement "all reasonable efforts" in our Extension program. Mr. Manning says he is not unalterably opposed to our implementing "all reasonable efforts," but he feels that it would not be in our best interest. He pointed out that we have implemented an affirmative action program informally except for the "all reasonable efforts" provision. He says that by stratifying communities geographically, we will first of all lower the standards for our program inasmuch as we will be forced to accept 4-H Club members, for example, who may not have the interest or talent to participate in club activities. He says we will have to adapt our program more toward federal guidelines; but, more importantly, he says that this really provides the foundation for a civil action suit by the Justice Department who may point out that, "Okay, you structured communities for integrated clubs and you are not achieving the level of integration projected; therefore, you are not in compliance."

Mr. Manning says that he has based our entire defense on the fact that the N. C. Agricultural Extension Service has been trying—within its own system—to voluntarily achieve integration throughout its programs. He says we can substantiate that this change has occurred over time and that, whereas if we had tried to force the change through a rigid affirmative action program, that we would have simply lost the 4-H and home economics programs, as some other states have. He says we have tried to use judgment in determing how fast we could move and where we had to yield in order to maintain ongoing programs. He says the judge understands this and that now if we try to implement an "all reasonable efforts" program, then what we will be in effect doing is saying to the judge that we were not successful in this and now we are trying to set up a program to bring about forced change in our programs. He says this would defeat the foundation that he has been using for our defense.

You will need to weigh this feeling and decide, but I am inclined to agree with Mr. Manning that perhaps we should not implement the "all reasonable efforts" provision right now. Not only would there be a lot of resistance in our communities among clientele for this type of approach, but even within our own organization there is going to be a lot of dissension. Both Mr. Manning and I feel that ultimately we will be forced to get into the "all reasonable efforts" program, but perhaps it might be best to wait until our civil action is resolved. I will abide by your decision in the matter.

cc: Dr. Black

GOVERNMENT EXHIBIT 214

July 6, 1973

Dr. J. T. McCown
Associate Dean for Extension
University of Florida
Gainesville, Florida 32601

Dear Dr. McCown:

Dr. Blalock asked me to write you and send some information which we have on professional salaries in our organization. I have two pieces of information, both of which are based on the salaries that existed in the 1971-72 fiscal year.

The first is a multiple regression of the salaries of our full agents (not including chairmen) which assessed the effect on salaries of (a) a master's degree, (b) race, (c) sex and (d) experience. The results were as follows:

Value of a master's degree	$605
Amount of salary of blacks under salary of whites	$455
Amount of salary of women under salary of men	$663
Value of 10 years' experience	$653

The other piece of information shows average salaries for categories of agents identified by race, sex and rank. I believe that this table and this supplementary information

are self explanatory. The second page gives a good bit of detailed information about the groups—tenure, education, etc.

Please let me know if you have any questions about this information.

Sincerely yours,

George L. Capel
Assistant Director, Marketing
and Special Programs

GLC:ms
cc: Dr. T. C. Blalock
Enclosure

DEFENDANTS' EXHIBIT 78 (EXCERPT)

MEMORANDUM OF UNDERSTANDING BETWEEN THE N. C. AGRICULTURAL EXTENSION SERVICE-NORTH CAROLINA STATE UNIVERSITY AND THE BOARD OF COUNTY COMMISSIONERS

* * * * *

The North Carolina Agricultural Extension Service was established as a part of the School of Agriculture and Life Sciences of North Carolina State University by Federal and State legislation for the specific purpose of "extending" the educational service of the University to the people of the State on subjects relating to agriculture, home economics, 4-H and youth, community and natural resource development. It is the principal means by which the findings of research in these subjects are communicated to the people.

This legislation provided that Cooperative Extension work be a partnership between three levels of government—Federal, State, and County—with these levels being officially represented by the U.S. Department of Agriculture, North Carolina State University and the County Boards of Commissioners. By this arrangement County Extension Agents are joint employees of North Carolina State University and the Board of County Commissioners. They are also official representatives of the United States Department of Agriculture.

To assure maximum benefits of this educational service to the people it is important that the elected and appointed officials of each level of government understand their respective responsibilities and the relationships in the conduct of this work. It is to this end that the following description of responsibilities and relationships was developed.

RESPONSIBILITIES AND RELATIONSHIPS

The North Carolina Agricultural Extension Service will:

1. Provide the State proportionate share of salaries for County Extension personnel. The salaries of all workers will be determined jointly by the Agricultural Extension Service and County Boards of Commissioners, and the proportionate share paid by the State and by the County will be determined by the above two parties.

2. Provide funds for official travel necessary in the conduct of Extension work to the extent that funds are available and for purposes authorized by State and Federal policies.

3. Accept responsibility for:

a. Establishing minimum requirements and qualifications for employment in Extension work.

b. Receiving and examining applications for employment.

c. Interviewing and otherwise investigating applicants to determine their qualifications and availability.

d. Recommending to the County Commissioners, for their consideration, qualified applicants for appointment to vacant or new Extension positions.

4. Prepare and submit an annual budget request to the Board of County Commissioners for the County's proportionate share of funds for the total operating budget.

5. Provide County Extension agents with official envelopes, bulletins, leaflets, and other publications.

6. Accept responsibility and provide the leadership for administration and supervision of Extension programs and personnel, including compliance with the requirements of the Civil Rights Act of 1964 applicable to the Cooperative Extension Service.

7. Provide a staff of specialists to continuously train agents in current technology and other changes affecting

agriculture, home economics, 4-H and youth, community and natural resource development and to assist them in the conduct of work in these areas.

8. Provide agents with individual on-the-job training by Extension specialists and district agents and plan and arrange for such group training programs and activities as are deemed advisable.

The Board of County Commissioners will:

1. Provide the County's proportionate share of salaries for the County Extension personnel. The salaries of all workers will be determined jointly by the Board of County Commissioners and the North Carolina Agricultural Extension Service.

2. Provide office space and equipment, utilities, telephone, office supplies, and demonstration materials needed for efficient operation of the County Extension Office and program.

3. Review and consider the annual budget request from the Extension Service and take appropriate action by July 1 of each fiscal year.

4. Confer and advise with the District and County Extension agents and Extension Advisory Boards relative to county Extension programs.

The North Carolina Agricultural Extension Service and the Board of County Commissioners mutually agree:

1. That all County Extension appointments and separations are to be worked out jointly by the North Carolina Agricultural Extension Service and the Board of County Commissioners, and that no official action will be taken by either party regarding appointment or separation prior to discussion of the matter with the other party.

2. That the policies established by the State of North Carolina and followed by the University be used as a guide in granting annual, sick, civil, and military leave for County Extension personnel.

3. To cooperate in meeting the requirements of the Civil Rights Act of 1964.

4. That the policies of North Carolina State University relative to the classification of employees will apply to all County Extension workers; therefore, they will not be classified under a county classification system.

5. That County Extension agents will be guided by County policies relative to office hours and holidays.

We are in agreement with the above description of the responsibilities and relationships, and that this memorandum of understanding may be reviewed at any time but shall be reviewed once each four years.

Date: _____ _____, *Chairman*

Board of _____
County Commissioners

Date: _____ _____, *Director*
North Carolina Agricultural
Extension Service

* * * * *

DEFENDANTS' EXHIBIT 196

SOUTHWESTERN	71/72%	1981	1976	1971
Alexander	40.72	25,089	16,730	14,263
Anson	31.08	21,000	18,080	13,474
Burke	47.86	27,152	18,303	14,040
Cabarrus	45.22	26,814	18,319	13,862
Caldwell	46.82	27,884	18,686	13,412
Catawba	41.27	28,788	18,537	14,619
Cleveland	36.87	27,204	18,801	13,600
Gaston	43.09	29,551	18,942	14,416
Iredell	39.12	30,901	20,574	14,308
Lincoln	41.36	26,391	16,754	15,339
Mecklenburg	52.42	29,500	19,150	13,975
Montgomery	36.56	26,000	18,471	12,742
Moore	48.50	24,185	17,610	12,752
Richmond	30.74	25,882	17,571	13,349
Rowan	39.25	27,871	21,622	15,976
Stanly	42.53	23,721	17,211	16,030
Union	36.65	31,004	17,500	14,760
TOTALS				
NORTH CENTRAL				
Chatham	35.95	28,116	18,940	13,910
Durham	39.60	27,015	18,375	13,375
Edgecombe	43.42	27,843	18,648	13,710
Franklin	27.69	24,842	17,023	13,106
Granville	38.22	30,402	Vacant	12,827
Halifax	42.73	31,177	19,159	14,596
Harnett	43.13	26,480	16,796	12,500
Johnston	44.20	33,765	21,217	15,145
Lee	35.93	21,584	17,680	13,008
Nash	40.36	25,990	17,135	12,936
Northampton	31.40	33,915	17,136	16,208
Orange	40.94	27,193	18,033	13,940
Person	27.85	26,045	18,480	13,206
Vance	37.01	22,740	18,325	13,466
Wake	44.30	29,458	21,800	16,588
Warren	29.73	24,244	17,730	13,400
Wilson	44.25	30,656	20,632	15,984
TOTALS				

WESTERN	71/72%	1981	1976	1971
Avery	8.27	22,500	17,800	11,621
Buncombe	33.18	32,681	21,595	14,806
Cherokee	26.26	26,141	17,784	12,314
Clay	12.11	20,000	17,350	12,421
Graham	31.45	25,581	16,500	12,918
Haywood	29.53	27,968	18,028	14,350
Henderson	34.00	29,561	18,203	13,301
Jackson	40.32	Vacant	19,350	13,170
Macon	30.25	29,459	18,400	12,806
Madison	18.21	27,546	18,300	12,596
McDowell	35.11	21,459	17,229	13,088
Mitchell	14.29	22,630	18,200	13,146
Polk	36.71	23,134	17,955	12,960
Rutherford	44.51	27,300	19,114	13,878
Swain	18.90	21,725	17,678	13,230
Transylvania	40.02	25,581	17,424	11,670
Yancey	18.76	25,323	17,350	12,043
TOTALS				
NORTHWESTERN				
Alamance	45.37	24,861	17,634	15,386
Alleghany	23.72	22,718	17,180	12,500
Ashe	26.94	21,052	16,276	12,198
Caswell	29.91	21,156	16,453	12,554
Davidson	45.33	29,067	19,328	15,474
Davie	30.13	29,492	18,283	13,575
Forsyth	53.46	30,155	22,243	16,230
Guilford	47.41	32,120	21,364	16,392
Randolph	46.42	31,384	17,655	13,924
Rockingham	50.68	27,592	21,860	16,646
Stokes	35.54	20,500	17,065	13,450
Surry	42.36	27,000	18,741	14,590
Watauga	26.38	24,762	16,993	13,728
Wilkes	39.44	26,530	18,977	14,667
Yadkin	30.59	27,270	16,646	13,388
TOTALS				

NORTHEASTERN	71/72%	1981	1976	1971
Beaufort	31.68	27,254	17,139	12,838
Bertie	23.96	25,275	16,484	13,001
Camden	15.96	25,285	16,356	11,726
Chowan	16.97	23,500	29,465	14,811
Craven	50.20	26,291	17,097	13,079
Currituck	28.40	26,292	18,337	12,868
Dare	22.12	23,260	16,028	11,601
Gates	18.16	29,564	19,209	12,355
Hertford	24.53	28,381	17,194	13,264
Hyde	18.85	28,490	18,284	12,682
Martin	40.58	29,426	18,805	13,143
Pamlico	20.82	23,000	18,189	13,243
Pasquotank	29.44	31,506	17,998	13,054
Perquimans	18.63	21,807	16,383	12,828
Pitt	43.32	27,556	19,848	14,581
Tyrrell	14.77	26,939	17,284	12,500
Washington	21.36	29,488	12,582	12,899
TOTALS				
SOUTHEASTERN				
Bladen	32.02	25,536	19,678	13,661
Brunswick	32.35	25,513	16,900	13,280
Carteret	37.56	27,655	17,806	13,227
Columbus	32.21	27,766	16,968	13,913
Cumberland	47.77	37,044	18,934	14,223
Duplin	30.85	26,878	18,615	14,156
Greene	30.31	26,860	18,000	12,792
Hoke	32.63	22,008	17,674	13,618
Jones	19.71	28,183	18,470	13,080
Lenoir	35.37	34,558	23,931	12,582
New Hanover	38.83	28,898	20,024	14,702
Onslow	39.19	24,783	14,422	12,524
Pender	27.57	25,295	16,871	12,252
Robeson	40.50	28,250	19,302	14,970
Sampson	37.27	34,577	19,490	13,862
Scotland	43.45	25,764	16,756	12,914
Wayne	44.14	28,962	21,532	16,278
TOTAL				

DEFENDANTS' EXHIBIT 201

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE

December 1976 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	102	12,924	8.3	91	12,821	7.7	11	13,772	13.0
White	387	13,054	9.8	294	12,698	9.3	93	14,181	11.5

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 202

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
February 1979 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	117	14,826	10.2	88	14,838	10.8	29	14,792	8.4
White	380	15,085	8.8	291	14,693	8.0	89	14,683	8.0

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 203

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
November 1979 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	110	15,631	10.4	89	15,653	10.2	21	15,537	11.2
White	382	16,071	9.2	284	15,630	8.5	98	17,349	11.1

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 204

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE

April 1980 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	103	16,010	10.4	84	15,773	10.1	19	17,060	11.9
White	367	16,050	8.7	271	15,649	8.2	96	17,182	10.4

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 205

NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE
April 1981 Salary Summary

	All Agents (1)			Bachelor's Degree			Master's Degree		
	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure	Number	Average Salary	Average Tenure
Black	91	18,420	12.6	75	18,180	12.1	16	19,549	14.8
White	373	18,180	10.3	277	17,711	9.5	96	19,532	12.4

(1) Does not include County Extension Chairmen, which are partially administrative in nature.

DEFENDANTS' EXHIBIT 219

TRENDS IN THE NORTH CAROLINA 4-H PROGRAM
1971-80

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Members in:										
4-H Clubs	38,491	37,763	37,246	38,393	36,776	35,697	33,730	34,191	33,103	32,970
4-H Special Interest	26,648	31,544	44,588	57,196	53,864	57,711	64,224	62,854	76,036	62,483
4-H T.V.	71,442	99,147	123,769	103,718	None	92,172	2,621	None	None	133
Total (excluding TV)	65,139	69,307	81,834	95,589	90,640	93,408	97,954	97,045	109,139	95,453
Total (including TV)	136,581	168,454	205,603	199,307	90,640	185,580	100,575	97,045	109,139	95,586
Units:										
4-H Clubs	1,876	1,747	1,748	1,844	1,786	1,714	1,731	1,730	1,714	1,665
Special Interest Groups	**	840	1,109	1,338	1,469	1,584	1,337	1,518	1,851	1,783
Total Units:	1,876	2,587	2,587	3,182	3,255	3,298	3,068	3,248	3,565	3,448

[CONTINUED NEXT PAGE]

DEFENDANTS' EXHIBIT 219 – Continued

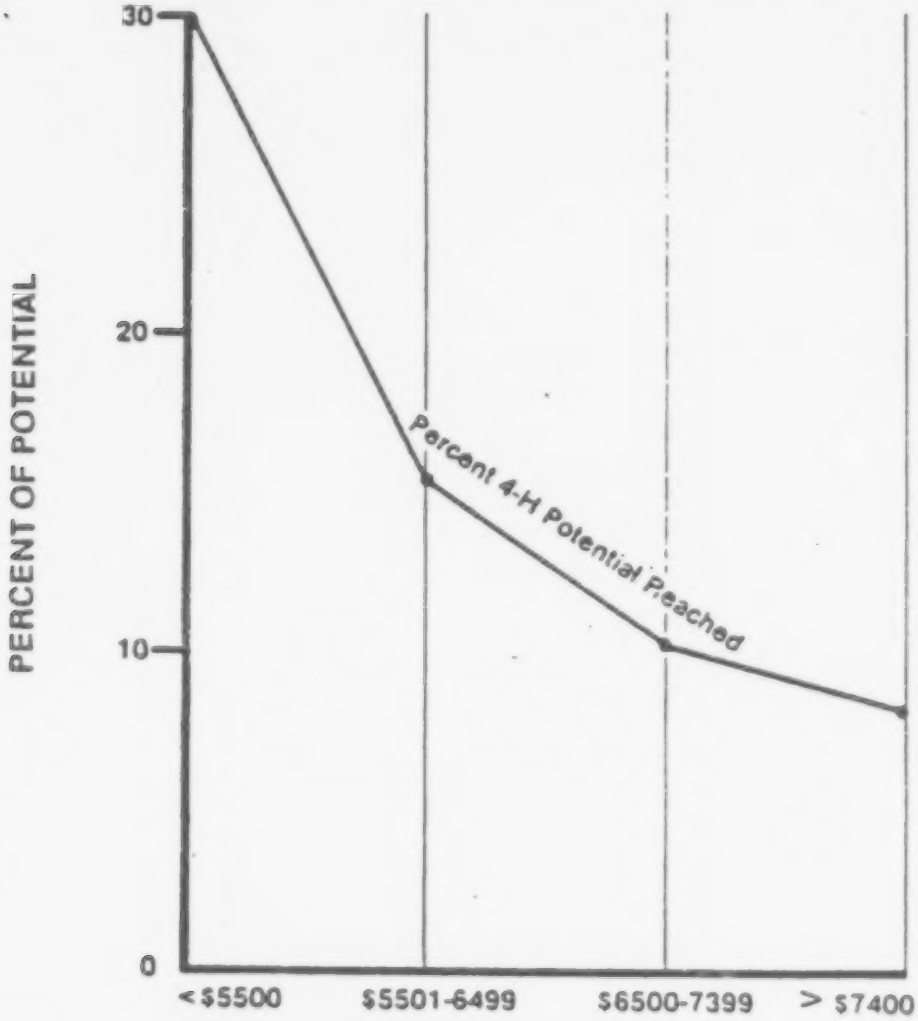
TRENDS IN THE NORTH CAROLINA 4-H PROGRAM
1971-80

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980
Leaders:										
Adult Leaders	7,407	6,472	7,270	7,932	8,777	9,363	10,522	11,213	12,408	12,607
Junior Leaders	2,599	2,323	2,390	2,393	2,591	2,702	2,602	2,993	3,172	2,671
	10,006	8,795	9,660	10,325	11,368	12,065	13,124	14,206	15,580	15,278
**Place of Residence:*										
% Farm	37%	31%	32%	29%	28%	26%	22%	21%	21%	24%
% Towns under 10,000	48%	50%	50%	50%	49%	51%	50%	50%	49.7%	52%
% Cities 10,000 to 50,000	11%	9%	12%	11%	14%	13%	11%	11%	10.5%	14%
% over 50,000	4%	10%	7%	10%	10%	10%	17%	18%	18.8%	10%

*Data base is membership in 4-H clubs and special interest groups
**Not reported

DEFENDANTS' EXHIBIT 221

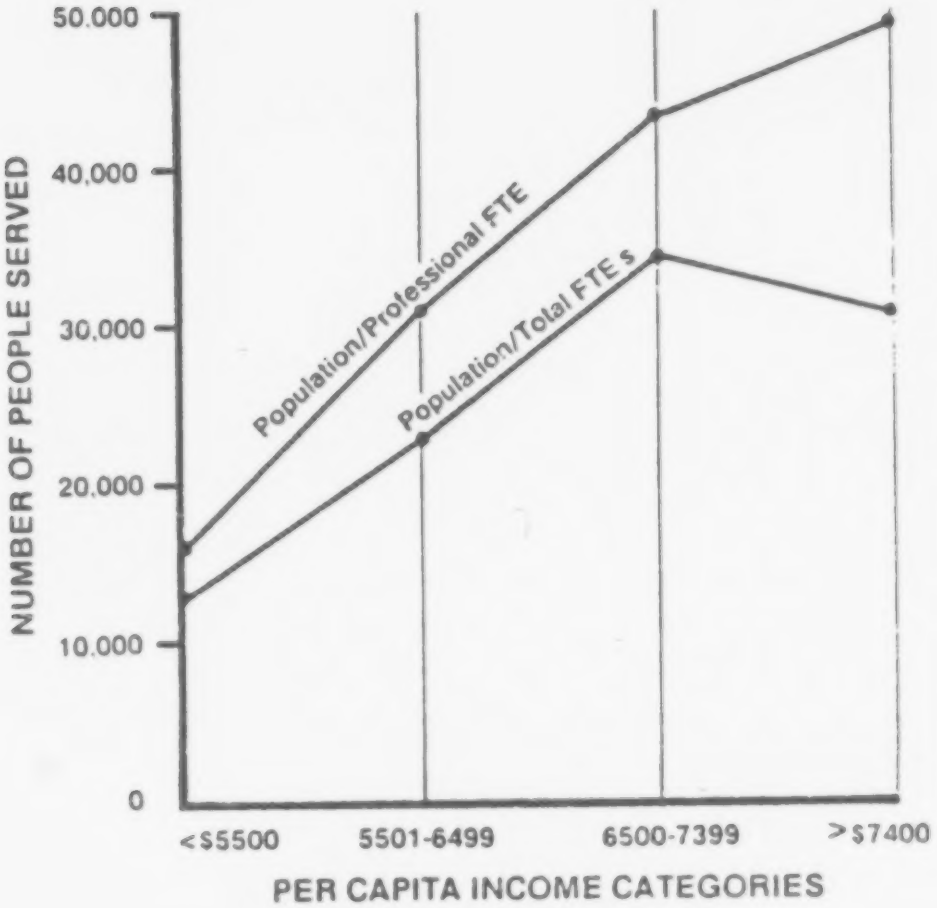
PERCENT OF POTENTIAL YOUTH AGES 9-19 REACHED WITH 4-H PROGRAMS FOR COUNTIES GROUPED BY SELECTED CATEGORIES OF PER CAPITA INCOME



Sources: 1980 ES-237 Report
1980 Census of Population
1980 Records of District Extension Chairman

DEFENDANTS' EXHIBIT 222

NUMBER OF PEOPLE SERVED BY EXTENSION 4-H STAFF, PROFESSIONAL AND TOTAL (INCLUDES PARAPROFRESSIONAL) IN COUNTIES GROUPED BY SELECTED CATEGORIES OF PER CAPITA INCOME



Sources: 1980 Census of Population
1980 ES-237 Report
1980 Records of District Extension Chairmen
1980 4-H Expansion Budget

DEFENDANTS' EXHIBIT 227

4-H VOLUNTEERS

Year	Black	Percent-age	White	Percent-age	Total
1972	2,665	31	5,988	69	8,653
1976	3,760	32	8,174	68	11,934
1980	4,022	27	11,122	73	15,144

4-H MEMBERSHIP

Year	Black	Percent	White	Percent	Total*
1972	22,174	32	46,313	68	68,486
1976	32,210	35	60,146	65	92,356
1980	30,243	32	64,138	68	94,381

* American Indian excluded from data

DEFENDANTS' EXHIBIT 228

Year	Number of Single Racial Clubs in Mixed Communities	Number of Youth Involved in these Clubs	Total State 4-H Membership
1974	1,014	19,789	95,589
1976	953	21,286	93,408
1978	920	17,625	97,045
1980	880	14,988	95,453

DEFENDANTS' EXHIBIT 255

SALARY DATA FOR 35 PEOPLE WHO WERE ACTIVELY EMPLOYED DURING 1975 BUT WERE NOT ON DR. MANN'S LIST OF PEOPLE USED IN HIS 1975 REGRESSION

	Salary Data			
	1973	1974	1975	1976
Marilyn Cole		9,641	9,711	10,741
William S. Dixon			9,100	10,276
Simpson Currin			14,080	14,890
James Dunford		12,204	12,397	
Pamela Gillenwater		9,472	9,472	
John Rutledge			9,604	
Ernest C. Short	10,257	10,887	10,957	11,535
John Stacy	16,441	17,809	18,255	18,855
George Stoudemire	17,015	19,014	20,350	
Mary M. Swanner	8,500	9,242	9,292	
Colon Godwin		13,815	15,415	
Archie Martin	15,000	16,464	19,379	
Marie Penuel			12,342	
James Sikes	8,500	9,350	9,615	
Harvey Thornton	9,406	10,156	10,369	
Barbara Hinnant			9,160	10,593
Marjorie Holloway	8,728	9,493	9,553	10,053
Ona Humphrey	15,281	16,413	16,513	
Slater T. Lloyd	11,947	12,970	12,970	
Dennis Osborne			11,100	12,000
Cullie Tarlton	17,007	18,505	19,014	
Linda Vandemark			10,450	
Marilyn Blanchard			9,259	9,559
Louise Capps	10,143	10,978	11,187	
Richard M. Edwards	12,149	13,236	13,316	14,116
James Piland			9,170	
Steve Riddick	8,692	9,856	12,500	13,428
Naomi Desantels			19,622	
Mary Gaddy	8,500	9,261	9,429	
Mary Jones	8,674	9,868	9,928	
William Meyer	10,000	10,800	12,650	
Clifton Parker	9,914	10,654	10,650	
Ray Williamson			9,498	
Marcia Winnies		9,100	9,160	9,510
Dori Boyd		9,100	9,150	

DEFENDANTS' EXHIBIT 258

Non-Extension Homemakers Audiences

Year	Man Days	% of H. E. Time
1978	3,881	77%
1979	37,474	82%
1980	36,911	82.5%

Supreme Court of the United States

No. 85-93

P. E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 12, 1985.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

Supreme Court of the United States

No. 85-428

UNITED STATES, ET AL., PETITIONERS

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Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

(1) Do Title VII and the Fourteenth Amendment permit a state to intentionally pay black employees less than white employees in the same job, so long as the original decision establishing that discriminatory wage differential was not itself the subject of a separate charge or action?

(2) Did the court of appeals err in holding that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable?

(3) May a state satisfy its obligation to desegregate a de jure system by

adopting a freedom of choice plan that fails?

(4) May an employer immunize itself from liability for employment discrimination by delegating its employment decisions to a discriminatory third party?

(5) Did the court of appeals err in holding that this case should not be certified as a claim action?*

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* The parties to this litigation are set forth at pp. iii-vi of the petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statement of the Case	6
Statement of the Facts	18
Summary of Argument	23
ARGUMENT	
I. Title VII and the Fourteenth Amendment Prohibit A Public Employer From Applying, As Well as Establishing, a Racially Based Salary System	23
(1) Salary Discrimination Is A Continuing Violation of the Equal Pay Act	25
(2) Neither Teamsters nor Evans Supports the Decision Below ..	32
(3) Salary Discrimination Is A Continuing Violation of the Fourteenth Amendment	40

		Page
II.	Petitioners Established the Existence of Post-1965 Intentional Salary Discrimination	45
	(1) Petitioners' Statistics Established a Prima Facie Case of Discrimination	47
	(2) Respondents Failed to Rebut That Prima Facie Case	60
III.	Title VII and the Fourteenth Amendment Place on Public Agencies a Non-Delegable Duty to Act in a Non-Discriminatory Manner	71
IV.	The Courts Below Erred in holding NCAES Had No Obligation to Disestablish a State Created System of Government Sponsored Single Race 4-H and Extension Homemaker Clubs	87
	(1) The History of the Clubs	87
	(2) The Applicable Legal Requirments	94

Page

V. The Courts Below Erred in Refusing to Certify this Case as a Class Action 99

CONCLUSION 110

APPENDIX: Statutes, Regulations, and Constitutional Provisions Involved 1a

TABLE OF AUTHORITIES

Cases	Page
Aooad v. Detroit Board of Education, 431 U.S. 209 (1977) ...	88
Adickes v. S. H. Kress Co., 398 U.S. 144 (1970)	79
Alston v. School Board of Norfolk, 112 F.2d 992 (4th Cir. 1940)	41
Arizona Governing Board v. Norris, 403 U.S. 1073 (1983)	21,76,79
Bell v. Georgia Dental Ass'n, 231 F.Supp. 299 (N.D. Ga. 1964)	82
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).....	79
Connecticut v. Teal, 457 U.S. 440 (1982)	56
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)..	18,19,25,26,28 30-31
County of Washington v. Gunther, 452 U.S. 161 (1981)	19,26,27
Craig v. Boren, 429 U.S. 190 (1976)	41,51
Craik v. Minnesota State University Bd., 731 F.2d 465 (8th Cir. 1984)	67,72

Page

Dothard v. Rawlinson, 433 U.S. 321 (1977) 20,49,62,64

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 22,107

Falcon v. General Telephone Co., 628 F.2d 369 (5th Cir. 1980) 70

General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982)..... 82-85

General Telephone Co. v. EEOC, 446 U.S. 318 (1980) 23,100-02

Green v. County School Bd., 391 U.S. 430 (1968) 42,97,98

Griffin v. County School Bd., 377 U.S. 218 (1964) 42

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 68,83

Guardians Association v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980) 64

Guinn v. United States, 238 U.S. 347 (1915) 43

Hazelwood School District v. United States, 433 U.S. 299 (1977) 16,56,58,60

Page

Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1978) 37

Lee v. Macon County, 267 F.Supp. 458 (M.D. Ala. 1966) 86

Lee v. Washington, 390 U.S. 333 (1968) 109

Mayor v. Educational Equality League, 415 U.S. 605 (1974)..... 56,58,60

Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) 82

Movement for Opportunity v. General Motors, 622 F.2d 1235 (7th Cir. 1980) 70

Neal v. Delaware, 103 U.S. 370 (1890) 50,58,59

Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969) 37

Patton v. Mississippi, 332 U.S. 463 (1947)..... 20,62

Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982) 55

Plessy v. Ferguson, 163 U.S. 537 (1895) 41

Page

schaver v. Rhodes, 416 U.S. 232 (1974) 88

Smith v. Allwright, 321 U.S. 649 (1944) 80

Strauder v. West Virginia, 100 U.S. 303 (1880) 42

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) 42

Teamsters v. United States, 431 U.S. 324 (1977) 24,32-34,50,52, 55,60,75

Terry v. Adams, 345 U.S. 457 (1953) 81

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 54,67

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 95

Trout v. Lehman, 702 F.2d 1044 (D.C. Cir. 1983) 65,70

Turner v. Fouche, 396 U.S. 346 (1970)..... 68

United Airlines v. Evans, 431 U.S. 533 (1977) 24,32-34

Page

United States v. SCRAP, 412 U.S. 669 (1973) 63

Vulcan Society v. Civil Service Comm'n, 490 F.2d 387 (2d Cir. 1973) 54

Wallace v. United States, 389 U.S. 215 (1967) 85

Washington v. Davis, 426 U.S. 229 (1976) 43

Williams v. New Orleans Steamship Ass'n, 673 F.2d 742 (5th Cir. 1982) 72

Statutes and Constitutional Provisions

Fourteenth Amendment, U.S. Constitution i,3,5,40-45,84

Fifteenth Amendment, U.S. Constitution 80

Civil Rights Act of 1964, Title VI 3,5,95,96

Civil Rights Act of 1964, Title VII ..... passim

Equal Pay Act, 28 U.S.C. §206(d)(1) 18,19,25-30,51

28 U.S.C. § 1254(1)..... 2

42 U.S.C. § 1981 82-84

	Page
42 U.S.C. § 2000e-2(~~a~~)	32
42 U.S.C. § 2000e-2(h)	27
Section 703(h), Title VII, Civil Rights Act of 1964 ...	33-34,39
Ore. Rev. Stat. § 137.350	37
Other Authorities	
7 C.F.R. § 15.3(b)(6)(i)	22,95-96
Rule 23, Federal Rules of Civil Procedure	22,102-03, 106-07
Rule 401, Federal Rules of Evidence	53
110 Cong. Rec. (1964)	28,30
H.R. Rep. 914, 88th Cong., 1st Sess. (1964)	36,53
"Perpetuation of Past Discrimination", 96 Harv. L. Rev. 828 (1983)	42,82

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 751 F.2d 662, and is set out at pp. 346a-481a of the Appendix to the Petition for Writ of Certiorari. The order denying rehearing, which is not reported, is set out at pp. 482a of that Appendix. The district court's memorandum of decision regarding class claims, dated October 9, 1979, which is not reported, is set out at J. App. 73-87. The district court's memorandum of decision of August 20, 1982, regarding class claims, which is not reported, is set out at pp. 3a-207a of the Petition Appendix. The district court's memorandum of decision regarding

individual claims, dated September 17, 1982, is set out at pp. 216a-345a of the Petition Appendix.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1984. A timely petition for rehearing and suggestion for rehearing en banc was denied by an evenly divided court on April 15, 1985. July 14, 1985, was a Sunday. The petition for writ of certiorari was filed on July 15, 1985, and was granted on November 12, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an action seeking to redress racial discrimination in the operation of the North Carolina Argicultural Extension Service (NCAES).[1] NCAES is a federally

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[1] The complaint named as defendants a number of specific NCAES officials as well as the counties which jointly operated the NCAES

funded state agency which provides assistance to farmers and others throughout North Carolina, and which organizes and assists the system of 4-H and extension homemaker clubs in the state. Petitioners filed this action in November 1971, alleging that NCAES had engaged in a variety of practices violating, inter alia, Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment. Petitioners subsequently amended their complaint to include an allegation that NCAES had violated Title VII of the 1964 Civil Rights Act, as amended in 1972, by engaging in employment discrimination. Several federal officials were initially

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program. For simplicity this brief refers to actions of all of these defendants as actions of NCAES; this use of terminology should not be understood to suggest that only the defendant agency, as such, was responsible for or involved in the disputed activities.

named as defendants in this action. In April, 1972, the United States intervened as a party-plaintiff, and the district court subsequently realigned the federal defendants as plaintiffs-intervenors.

The private plaintiffs filed several motions seeking certification of this case as a class action, and seeking to certify all the counties in North Carolina as a defendant class. Each of these motions was denied. The trial of this action focused on four distinct claims which remain in dispute. First, petitioners alleged that different base salaries established prior to 1965 for black and white workers in the same job had remained in effect, and that blacks hired before 1965 thus continued to be paid less than their white colleagues. Second, petitioners alleged that for more than a decade after 1965 respondents continued to

engage in intentional racial discrimination in compensation. Third, petitioners alleged that respondents had engaged in intentional racial discrimination in selecting the paid county chairman responsible for supervising the NCAES office in each county. Fourth, petitioners asserted that continued state assistance to several thousand single race 4-H and extension homemaker clubs violated both Title VI and the Fourteenth Amendment.[2]

The district court and a majority of the court of appeals rejected all of petitioners' claims. Judge Phillips

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[2] In addition to these claims of systematic class wide discrimination, petitioners sought to prove the existence of discrimination against a number of specific individuals. The courts below, in rejecting those individuals claims, expressly premised those decisions on their view that there had been no systematic discrimination. Pet. App. 380a, 218a n.70 (sic).

dissented from the panel opinion, insisting that the denial of relief was error as a matter of law. A timely petition for rehearing and suggestion for rehearing en banc was denied by an equally divided court.

STATEMENT OF THE FACTS

Prior to 1965 NCAES was avowedly organized along strictly racial lines. There were separate black and white offices in every county, servicing exclusively black and white citizens respectively. NACES maintained separate wage systems for black and white employees, deliberately paying black workers less than similarly situated whites doing the same job.[3] Both courts below found that these racially based salary differentials continued well past 1971, the year

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[3] Pet. App. 30a, 120a, 359a, 380a, 384a, 389a, 399a.

in which this action was filed,[4] and the court of appeals concluded that those disparities persist to this day.[5] NCAES' Director testified that the dual salary system had originally been established because there was less of a demand for black workers than for comparable whites:

> [Black home economics agents could be hired at a lower salary than white agents could. [B]lack agricultural agents could be hired and retained at a lower salary than white agricultural agents.[6]

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4 Pet. App. 30a-31a, 122a-23a, 201a, 359a, 360.

5 The fourth circuit noted, "the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all of such disparity." Pet. App. 389a-90a.

6 C.A. App. 999. "C. A. App." refers to the court of appeals appendix. Because the underlying record is particularly voluminous and unwieldly, ten copies of the court of appeals appendix have been lodged with the clerk.

NCAES provided substantial material and other assistance to several thousand NCAES sponsored 4-H and extension homemaker clubs across the state; these clubs were organized along strictly racial lines, and NCAES employees who worked with these clubs were assigned on a racial basis. The NCAES operation in each county was overseen by a paid employee known as the county chairman. When this position was first created in 1962, NCAES expressly directed that it be given to the highest ranking white employee in each county. Every new chairman appointed between 1962 and 1965 was white.

The practice of fixing salaries or raises on the basis of race did not end in 1965. In 1971 the Director of NCAES wrote

a memorandum describing the specific reasons why race still affected salary decisions:

> Obviously one of the areas where we'd be checked on is salary.... Our salaries for women and non-white men on average are lower. Our figures verify. Due to several factors -
> -- The competitive market --This is not acceptable as a reason though.
> -- Tradition - not just in Ext[ension Service].
> -- Less county support for non-white positions.[7]

Petitioners demonstrated that NCAES consistently paid blacks lower salaries than were paid to whites holding the same positions. A direct comparison of the average salaries of blacks and whites working as associate agricultural agents, the single largest job title, revealed a persistent and substantial disparity:

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[7] J. App. 129; C.A. App. 1606-07; see also J. App. 90-92.

Associate Agricultural Agents
1970-81[8]

Year	Average White Salary	Average Black Salary	Difference in Average Salary
1970	$ 9,876	$ 8,956	$ 920
1971	10,240	9,558	682
1973	10,292	9,797	495
1974	10,244	9,840	404
1976	12,711	11,885	826
1979	14,754	13,518	1,236
1980	15,253	14,485	768
1981	17,035	15,849	1,186

These disparities were particularly significant for two reasons. First, since associate agent is a lower level job, virtually all of the employees whose wages are reflected in this table were hired after 1965. Second, in every year the average tenure of black workers was greater than that of white workers holding

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[8] Average salaries for individual years are set forth in C.A. App. 1562; GX 95; PX 50; PX 100; and GX 98.

the same position.[9] Petitioners offered data showing similar disparities in the average salaries paid to blacks and whites in other positions.[10] The accuracy of these calculations was not questioned by respondents or by either court below.

Both parties also offered evidence in the form of regression analyses, which calculated differences in the average salaries of blacks and whites who were not only in the same job, but also had the same education, tenure, and sex. Experts for both the government and NCAES utilized essentially identical statistical methods, and arrived at essentially similar results.

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[9] See sources cited n. 8, supra.

[10] See sources cited n.8, supra; J. App. 128. In the case of associate home economics agents, the disparity rose from $358 in 1970 to $411 in 1981.

Salary Disparities:

Average Amount by which Salaries of Whites Exceeded Salaries of Blacks with Same Position, Education, Tenure and Sex

Year	Government Regression Analysis[11]	Defense Regression Analysis[12]
1974	$257-337	$364-381
1975	312-395	384-391
1981	158-248	310-415

Experts for both sides agreed that these salary disparities were statistically significant at least as late as 1975. (Pet. App. 117-119). In an effort to ascertain whether these disparities were

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[11] Pet. App. 117a-119a, 444a; C.A. App. 399-418, 1568, 1601; GX 123 at 289, 297, 310 (for 1974); GX 124 at 33, 39, 48, 60 (for 1975); GX 122 at 37, 46, 55 (for 1981).

[12] Pet. App. 140a, 444-45a; C.A. App. 1681, 1693-1715; see also J. App. 159. For both analyses differences in each year depend on the order in which the variables were considered. These figures do not include adjustments for quartile ratings, which petitioners contended was a major method used by NCAES to discriminate in salaries.

due to performance ratings, the defense expert modified his analyses to compare black and white employees with the same ratings. That adjustment actually increased the demonstrated disparity in wages for 1975,[13] indicating that on average blacks were being paid less than whites even though NCAES believed the blacks were doing better work than whites.

The record also showed that the pre-1965 practice of naming only whites as county chairman continued with little change. Because of state requirements that county chairmen have extensive experience within NCAES, virtually the only individuals considered for or promoted to the position of county

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[13] J. App. 445a; C.A. App. 1716.

chairman are full agents.[14] During the last two decades blacks have constituted approximately 25% of full agents.[15] Since 1963 the numbers of blacks and whites promoted to the position of county chairman were as follows:[16]

Period	White	Black	Percent Black
1962-1967	115	0	0%
1968-1975	51	1	1.7%
1976-1981	46	5	9.8%
1962-1981	212	6	2.6%

A number of facts regarding how this disparity came about are not in dispute. NCAES has never promoted a black to a

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[14] Since 1972 all new county chairmen have previously served as full agents. C.A. App. 1755.

[15] GX 100; C.A. App. 1562.

[16] J. App. 127; GX 74; C.A.App. 1745. The names and race of each applicant and appointee from 1968 through May 1981 are set out in J. App. 114-26 and C.A. App. 1736-1742. The applicants are also listed in the chart following Pet. App. 419a in the court of appeals' opinion.

county chairmanship for which a white male also applied. In every instance in which a black and a white male applied for the position of county chairman, the white male was chosen.[17] There were only six blacks appointed county chairman during this 19 year period; in four instances only blacks had applied for the position,[18] and in the other two cases the only white applicants were women.[19] In the case of vacancies for which both black and white males applied, the number of black appointees, 0, is 4.5 standard deviations

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[17] There were such 20 such vacancies. (C. A. App. 1736-40; chart following p. 419a of the Petition Appendix.)

[18] Carl Hodges (1971), B. T. McNeill (1976); Leroy James (1978) and Hoven Royals (1980). See C. A. App. 1736-40; chart following page 419a of the Petition Appendix.

[19] In 1979 L.C. Cooper was selected over Emily Ballinger. C.A. App. 1737. In 1981 Willie Featherstone was chosen over Ellen Willis. 751 F.2d 652, 678.

below the statistically expected number. In the case of vacancies applied for by blacks and either white males or white females, the number of standard deviations is 3.8.[20]

As a general rule NCAES selects a single applicant for promotion to county chairman; that name is then sent for approval to county officials, and almost invariably the counties accept NCAES' choice. (Pet. App. 78a). Prior to 1975, however, NCAES followed a different procedure when both blacks and whites applied for a vacancy; in such cases NCAES ordinarily approved two applicants, a black and a white, and sent both names to the county officials.[21] Where the final

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[20] The standard deviations are calculated using the chi-square methodology of Hazelwood School District v. United States, 433 U.S. 299, 311 n.17 (1977).

[21] This occurred in over three-fourths of all such pre-1975 vacancies. See sources

decision was thus delegated to a county, the county always chose the white applicant. Beginning in 1975, NCAES followed a different practice, in all but one instance referring only a single name to the county involved.[22] In every case in which a black and a white male applied for a vacancy, and NCAES decided to select only a single applicant, NCAES chose the white applicant.

The only action taken by NCAES to modify the de jure systems of 4-H and extension homemaker clubs was to adopt a freedom of choice plan. That plan had, as Judge Philips noted in his dissenting opinion below, only a "minimal" effect. (Pet. App. 471a). On two occasions NCAES briefly adopted proposals for affirmative

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cited, n.17, supra. In every instance it selected the white. Id.

[22] Id.

steps to disestablish this dual system; in both instances the proposal was rescinded at the request of NCAES' trial counsel, who warned that such efforts to integrate the 4-H extension clubs would "lower the standards for our program inasmuch as we will be forced to accept 4-H club members .. who may not have the ... talent to participate in club activities." (J. App. 157; C.A. App. 1904).

SUMMARY OF ARGUMENT

I. Title VII forbids an employer to base an employee's compensation on a racially motivated base wage or wage scale, regardless of whether that base wage or scale was established prior to 1965. Salary discrimination is a continuing violation of the Equal Pay Act, and pre-Act discriminatory salary differentials became illegal on the effective date of that Act. Corning Glass Works v.

Brennan, 417 U.S. 188 (1974). The standards of the Equal Pay Act are applicable to an equal-pay-for-equal-work claim under Title VII. County of Washington v. Gunther, 452 U.S. 161 (1981). In the instant case both courts below found that prior to 1965 NCAES set different base salaries for blacks and whites doing the same job, and that those salary differentials remained in effect until at least the mid-1970's.

II. Evidence of a disparity in the average salary of blacks and whites in the same job is sufficient to establish a prima facie case of salary discrimination. Such evidence establishes a prima facie case of salary discrimination under the Equal Pay Act, Corning Glass Works, 417 U.S. at 197, and the same standard applies under Title VII. Experts for both petitioners and respondents agreed there

were statistically significant disparities in the average salaries of blacks and whites with the same job, education and tenure. Petitioners were not obligated to demonstrate that no possible additional variable might have explained away those disparities. Dothard v. Rawlinson, 433 U.S. 321 (1977).

A defendant cannot rebut proof of such statistical disparities merely by hypothesizing that some non-racial factor might have explained these differences. A defendant must prove that the non-racial factor on which it relies would in fact account for the proven disparities. Patton v. Mississippi, 332 U.S. 463 (1947). Respondents made no effort to meet that burden, but merely offered speculation that the salary disparities might have had a legitimate non-racial cause.

III. An employer cannot escape its responsibilities under Title VII by delegating employment decisions to a third party. Arizona Governing Board v. Norris, 403 U.S. 1073 (1983). In this case NCAES has never promoted a black to the position of a county chairman if a white male also applied for the vacancy. The court of appeals erred in holding that this practice could be defended by evidence that NCAES frequently permitted county officials to decide whom NCAES would promote.

IV. Prior to 1965 NCAES established a de jure system of separate black and white 4-H and extension homemaker clubs. In 1965 NCAES adopted a freedom of choice plan that failed; the number of single race clubs today is virtually the same as it was 20 years ago. Respondents' failure to disestablish this dual system violates

the applicable federal regulations. 7 C.F.R. § 15.3 (b)(6)(i). Petitioners also offered substantial evidence indicating that members of these clubs continue to be recruited on a racial basis. The lower courts erred in failing to resolve the latter claim.

V. The fourth circuit held that class certification was inappropriate because petitioners had not demonstrated that the proposed class was injured by any "legally cognizable wrong." There were of course statewide NCAES practices of which petitioners complained; the fourth circuit, holding that those practices were lawful, concluded that the case thus presented no "legally cognizable wrongs." The court of appeals erred in basing certification on its view of the merits of the claims involved. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

The district court believed that class certification was impermissible because the United States had filed a pattern and practice action raising similar issues. That decision was inconsistent with the intent of Congress to provide overlapping private and governmental remedies for violations of Title VII. General Telephone Co. v. EEOC, 446 U.S. 318 (1980).

ARGUMENT

I. TITLE VII AND THE FOURTEENTH AMENDMENT PROHIBIT A PUBLIC EMPLOYER FROM APPLYING, AS WELL AS ESTABLISHING, A RACIALLY BASED SALARY SYSTEM

Both courts below found that the wage rates of blacks hired prior to 1965 had for racial reasons been set at levels lower than the salaries of comparable whites, and that these racially based wage disparities continued until at least the

mid-1970's. (See pp. 6-7, supra). The court of appeals, however, held that only the establishment of such a racially tainted wage system, but not the actual utilization of that system, constituted discrimination. (Pet. App. 380a-82a) Because the base wages of petitioners such as Bazemore were established prior to 1965, while the instant action was only commenced in 1971, the fourth circuit reasoned that NCAES was entitled to continue indefinitely paying petitioners lower salaries than the wages paid to their comparable white colleagues. The court of appeals believed that this result was compelled by this Court's decisions in Teamsters v. United States, 431 U.S. 324 (1977) and United Airlines v. Evans, 431 U.S. 533 (1977). The fourth circuit's decision conflicted with the opinions of seven other circuits, which have held that

salary discrimination is a continuing violation of Title VII. See cases cited, Petition, pp. 17-22.

(1) Salary Discrimination Is A Contining Violation of the Equal Pay Act

The question of whether salary discrimination constitutes a continuing violation of Title VII is, we urge, controlled by this Court's construction of the related provisions of the Equal Pay Act of 1963. In Corning Glass Works v. Brennan, 417 U.S. 188 (1974) this Court held that salary discrimination is a continuing violation of the Equal Pay Act, and that that Act thus forbids an employer to continue to use discriminatory pre-Act salary scales. In Corning Glass male workers hired prior to 1964 had been given higher base salaries than women doing the same work. The Court explained:

> The differential ... reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

417 U.S. at 205. (Emphasis added).[23] The decision in Corning Glass is, for several reasons dispositive of the same issue under Title VII.

First, in County of Washington v. Gunther, 452 U.S. 161 (1981), every member of this Court agreed that the substantive standards of the Equal Pay Act should apply to an action under Title VII alleging a denial of equal compensation

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[23] See also id. at 208 ("If ... the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act.")(Emphasis added)

for equal work. The Equal Pay Act, adopted in 1963, requires covered employers to give women the same salaries paid to men doing the same work. 29 U.S.C. §206(d)(1). The Equal Pay Act authorizes an employer to utilize certain salary differentials, and the Bennett Amendment to Title VII, 42 U.S.C. §2000e-2(h), extends that authorization to Title VII claims of salary discrimination against women. Although the Court in Gunther was sharply divided as to the meaning of the Bennett Amendment, both the majority opinion[24] and the dissenters[25] agreed that the substantive standards of the Equal Pay Act would be applied to an equal-pay-for-equal-work claim under Title VII. Both

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[24] 452 U.S. at 175 ("The Bennett Amendment clarified that the standards of the Equal Pay Act would govern ... Title VII ....").

[25] 452 U.S. at 190, 191-2, 200-01.

opinions emphasized that Senator Clark, the floor manager of Title VII, had explained to his colleagues that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII"[26] If, as this Court has already held in Corning Glass, the use of discriminatory pre-Act base wages violates the Equal Pay Act, the continued use of such base wages is also a violation of Title VII.

Second, if salary discrimination were treated as a continuing violation of the Equal Pay Act, but not of Title VII, a number of anomalies would result. If, prior to 1963, a white woman and a black man were both being paid less than a white

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[26] 452 U.S. at 172 n.12 (majority opinion), 192 (dissenting opinion). The quoted statement appears at 110 Cong. Rec. 7217 (1964).

man doing the same work, Corning Glass gives the woman a right to have her salary raised to the level of the white man, whereas under the fourth circuit decision the black man could be paid an inferior salary for the rest of his life. Similarly, although under the Equal Pay Act a female worker can challenge at any time a discriminatory pay differential established after 1965, a black worker, under the fourth circuit decision, must file an EEOC charge within 180 days of the creation of that differential, or be forever barred from redressing that discrimination. Nothing in the legislative history of Title VII suggests that Congress could have intended to thus provide blacks with more limited protections against salary discrimination than was already enjoyed by women under the Equal Pay Act. Those members of Congress

who successfully urged that Title VII extend to sex discrimination expressly disavowed any intention to confer upon women any greater rights or remedies than would be enjoyed by blacks.[27]

Third, the decision in Corning Glass accurately reflects the ongoing nature of salary determinations, and thus of salary discrimination. Hiring and promotion decisions may often be discreet, isolated and generally final actions, but the salaries paid to particular individuals, and for specific jobs, are ordinarily under continuous, or at least repeated, review. The legislative history of the Equal Pay Act highlighted the systematic manner in which American industry fixes

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[27] 110 Cong. Rec. 2581 (Rep. St. George) (Women "do not want special privileges); 2583 (Rep. Kelly) (urging that "all persons, men and women, possess the same rights"); 2584 (Rep. Watson) ("equal rights for all people").

the salaries for positions and individuals, generally focusing on four specific factors, skill, effort, responsibility and working conditions. Corning Glass Works v. Brennan, 417 U.S. at 199-202. Where an employer had for racial or sexist reasons set an inappropriately low salary for an individual or position, application of these "well defined and well-accepted" industry principles should ordinarily lead to a correction of that discrimination. 417 U.S. at 201. Congress understandably regarded as culpable an employer that, ignoring the generally accepted practice of job evaluation, persisted in applying pre-Act salary differentials rooted in discrimination. That culpability is the same whether the discrimination at issue was on the basis of sex or of race.

(2) Neither Teamsters nor Evans Support the Decision Below

Teamsters and Evans provide no basis for the decision of the fourth circuit. Both courts below found that NCAES was knowingly paying black workers less than white workers doing precisely the same job, relying on racially discriminatory base wage rates established prior to the effective date of Title VII. Such a practice clearly falls within the literal language of Title VII, which forbids an employer "to discriminate against an individual with respect to his compensation ... because of such individual's race." 42 U.S.C. § 2000e-2(a). Teamsters v. United States expressly held that as a general matter Title VII forbids the utilization of practices which operate to perpetuate the effects of pre-Act discrimination:

> Congress "procsribe[d] .. practices that are fair in form, but discriminatory in operation" ... One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in Griggs [v. Duke Power Co]: "Under the Act, practices ... neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." 431 U.S. at 349.

The continued use of a racially explicit base wage has precisely such a forbidden consequence.

In Teamsters this Court held that the use of a seniority system that perpetuated the effects of past discrimination would have violated Title VII "[w]ere it not for § 703(h)." 431 U.S. at 350. Both Teamsters and Evans relied on the terms of section 703(h), which expressly permits the utilization of a bona fide seniority system "[n]otwithstanding any other provision of [Title VII]." It was because

of just such a bona fide seniority system that blacks had been denied the promotions sought in Teamsters, and that the plaintiff had been denied the additional wages sought in Evans. In rejecting the seniority-related claims in those cases, the Court described section 703(h) as conferring "immunity" on bona fide seniority systems, 431 U.S. at 350, a term which made clear that section 703(h) created an exception to the general Title VII prohibition against practices perpetuating the effects of earlier discrimination. The result in Teamsters and Evans thus turned on the particular favored treatment for seniority systems that was demanded during the debates on Title VII and that was embodied in the language of section 703(h).

Nothing in the terms or legislative history of Title VII reflects any comparable desire to immunize racially motivated pre-Act salary systems or base wages, should those systems or wages continued to be utilized after the effective date of Title VII. If an employer, prior to 1965,[28] had been paying blacks less than whites for doing identical work, the literal language of the statute required that those salaries be adjusted to the same level when Title VII became effective on July 1, 1965. The proponents of Title VII noted with grave concern the different

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[28] Since this is an action against a state agency, the relevant effective date of Title VII is March 24, 1972, the effective date of the1972 amendments extending the coverage of that statute to state and local governments. The fourth circuit assumed, as do we, that the issue in this case, whether pre-1972 state salary systems are actionable under Title VII, turns on whether Title VII, as originally enacted, required alteration of pre-Act private employer salary differentials.

median salaries of blacks and whites, emphasizing that this disparity placed "an entire segment of our society ... into a condition of marginal existence."[29] Aware, as they were, that blacks were being paid less than whites for performing the same jobs, it is inconceivable that the Congress which adopted Title VII intended to freeze an entire generation of blacks into that position of inequality, or to provide equal pay for equal work only for blacks whose base salaries were established after July 1, 1965.

The decision of the fourth circuit entails consequences inconsistent in a variety of ways with other aspects of Title VII. Title VII forbids an employer to intentionally assign a lower wage to a

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[29] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, 28 (additional views of Reps. McCulloch, et al.)(1964)

particular position because most or all of the employees in that position are black or female. See County of Washington v. Gunther, 452 U.S. 161 (1981). But such discriminatory wage systems ordinarily were established, as was the case in Gunther,[30] long prior to the adoption of Title VII or the beginning of the limitations period that would be relevant to a constitutional claim.[31] If, as the fourth circuit has held, only the creation of such discriminatory wage scales, but not their application, is unlawful, then

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[30] The existence of separate position for female prison guards dated from prior to 1955. See note at Ore. Rev. Stat. § 137.350.

[31] See, e.g. Norman v. Missouri Pacific Railroad, 414 F.2d 73, 84-85 (8th Cir. 1969) (system established in 1930's); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 437-38 (D.C. Cir. 1978) (system established in 1947).

Gunther and the principle it establishes would be a dead letter.

The decision below would also emasculate the statutory and constitutional prohibitions against racial discrimination in the fixing of salaries for particular employees. Unlike discrimination in promotions or assignments, the effects of which are often obvious to all involved, the existence of discrimination in compensation is only rarely apparent, since the victims of that practice usually do not know the salaries of their white colleagues, and ordinarily have no method of comparing their wages with those of others doing the same work. In a substantial proportion of all reported Title VII wage compensation cases,[32] the plaintiffs were not able to detect that

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[32] See cases cited, Petition, pp. 17-22.

statutory violation until long after the deadline for filing a charge with regard to the intial act establishing their salaries.

The decision of the fourth circuit affords to salary scales a degree of protection far greater than that which Title VII provides even for seniority systems. To justify salary disparities under section 703(h), a defendant must prove both that those disparities were the result of seniority system, and that the system itself was bona fide; if defendant failed to establish that both the creation and maintenance of a seniority system were untainted by a discriminatory purpose, the affirmative defense authorized by section 703(h) would be unavailable. The fourth circuit decision regarding salaries would create a far more sweeping defense, holding that wage disparities caused by

pre-Act salary scales are unlawful regardless of whether those scales were in fact racially motivated. Thus pre-Act salary scales would enjoy a far greater degree of protection than pre-Act seniority systems, even though only seniority systems are afforded any degree of immunity under the actual language of Title VII. There is no reason to believe that the framers of Title VII intended any such incongruous result.

(3) Salary Discrimination Is a Continuing Violation of the Fourteenth Amendment

The fourth circuit rejected without explanation petitioners' claim that the utilization of racially tainted base wages violated the Fourteenth Amendment. Although those wage scales pre-dated Title VII and thus were not when established violative of that statute, those scales

were at all times unconstitutional under the Fourteenth Amendment. Even Plessy v. Ferguson, 163 U.S. 537 (1895), condemned such unequal treatment, and the fourth circuit itself expressly forbade salary discrimination by state agencies as early as 1940. Alston v. School Board of Norfolk, 112 F.2d 992 (4th Cir. 1940), cert. denied 311 U.S. 693 (1940). The disposition of petitioners' constitutional claim is necessary since, if sustained, that claim would entitle them to back pay for a period commencing in 1968, whereas the back pay period for their Title VII claim begins March 14, 1972, the effective date of the 1972 amendments.

Corning Glass recognized that the use of discriminatory base wages constituted a present violation of the Equal Pay Act because it "operated to perpetuate the effects of the company's prior illegal

practice of paying women less than men for equal work." 417 U.S. at 209-10. For over a century, and in a variety of circumstances, this Court has condemned as unconstitutional actions which perpetuate the effect of prior intentional racial discrimination.[33] See "Perpetuation of Past Discrimination", 96 Harv. L. Rev. 828 (1983). Although an equal protection claim requires proof of a discriminatory motive, it is not necessary that that motive and the injury complained of be contemporaneous, so long as the injury can be "ultimately ... traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976). The most egregious devices that perpetuated past

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[33] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971); Green v. County School Bd., 391 U.S. 430, 438 (1968); Griffin v. County School Bd., 377 U.S. 218, 232 (1964); Strauder v. West Virginia, 100 U.S. 303, 306 (1880).

discrimination were the infamous grandfather clauses, which based a citizen's right to vote on whether his or her ancestors had been eligible to vote prior to the adoption of the Fifteenth Amendment. This Court struck down those clauses because they made racial criteria in effect before the Civil War "the controlling and dominant test of the right of suffrage" more than half a century later. Guinn v. United States, 238 U.S. 347, 364-65 (1915).

In the instant case NCAES' racially explicit pre-1965 salary decisions were literally "the controlling and dominant test" for ascertaining what salary pe-titioners would be paid in the years that followed. If the North Carolina legislature had in 1964 fixed petitioner Bazemore's salary by statute, intentionally setting it at a lower level because

of his race, this Court would not hesitate to declare unconstitutional the continued enforcement of such a law. Surely the result is no different where, as here, the racially motivated state practice complained of was taken pursuant to an administrative decision rather than a state statute. Similarly, if a state agency in 1900 had established salary scales for specific jobs based on the race of the employees holding those positions, the fourth circuit would hold that that decision was only actionable at the beginning of the century; the applicable limitations period, on this view, would expire decades before present black employees were hired or even born. Such a construction of the Fourteenth Amendment would read into the Constitution itself the very evil condemned in the grandfather clause cases.

The factual findings of the courts below that racially motivated pre-1965 salary disparities continued until at least the mid 1970's thus compels the conclusion that respondents violated both Title VII and the Fourteenth Amendment. The burden is on the respondents to establish the date on which the continuing effects of those salary disparities finally ended. This claim should be remanded to the trial court for appropriate proceedings to determine the amount of back pay awarded, and to fashion any necessary injunctive relief.

II. PETITIONERS ESTABLISHED THE EXISTENCE OF POST-1965 INTENTIONAL SALARY DISCRIMINATION

Petitioners claimed and sought to prove at trial that the practice of intentional salary discrimination did not end in 1965, but continued for more than a

decade thereafter. Petitioners offered undisputed evidence that, even among individuals hired after 1965, the average salary of black workers was consistently lower than the average salary of whites holdng the same position and with the same education and tenure. (See pp.9-13, supra).

Both courts below, however, regarded this evidence as fatally defective. (Pet. App. 141a, 389a-91a) Neither the district judge nor a majority of the fourth circuit panel thought it particularly surprising or significant that for years blacks had been paid less than whites for doing the same job. Even though petitioners had shown a substantial and persistent disparity in the wages paid to blacks and whites in the same job, the courts below held that petitioners were legally obligated to demonstrate that

there was no possible legitimate explanation for those disparities. Respondents never offered any evidence demonstrating that consideration of additional variables would in fact have eliminated the apparent salary disparities, and both courts below held that such evidence was entirely unnecessary. The court of appeals and district court relied on somewhat different lines of reasoning in reaching this conclusion.

(1) Petitioners' Statistics Established A Prima Facie Case of Discrimination

The fourth circuit concluded that the statistical analyses offered by petitioners were entirely "unacceptable as evidence of discrimination" (Pet. App. 391). Evidence that whites make more than blacks for doing the same job, the appellate court insisted, is entitled to

no weight whatsoever as proof of salary discrimination. On the court of appeals' view, the statistics in this case did not even meet the minimal standard necessary to establish a prima facie case, and the defendants were thus under no obligation to offer any defense at all to that evidence. Unless a plaintiff demonstrated that no conceivable additional factor could explain away a statistical disparity, the court of appeals held that evidence that blacks are paid, hired, or promoted or given raises less often than whites would be devoid of weight or significance.[34]

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[34] The majority opinion rejected the individual claims of salary discrimination on a similar theory. Petitioners offered statistical comparisons of their wages with the wages of white agents with the same education tenure, job title and county. The majority dismissed that evidence on the ground that such comparisons did not also consider possible additional job qualifications or differences in job performance. (Pet. App.

The Court has repeatedly rejected similar arguments that statistical evidence must be absolutely conclusive in order to be probative. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the plaintiffs relied on population statistics to show that an employer's hiring criteria had an adverse impact on women. The defendant argued that the plaintiffs should have been required to demonstrate the impact of those criteria on actual applicants. This Court disagreed, explaining, "The plaintiffs in a case such as this are not required to exhaust every

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378a, 379a). Both the majority and Judge Phillips agreed that the district court's decision rejecting the individual claims would have to be reversed if there was proof of a pattern and practice of salary discrimination. (Pet. App. 380a, 467a). The district court acknowledged that its disposition of the individual claims turned on its view that there was no systematic salary discrimination. Pet. App. 218a n.70 [sic.]

possible source of evidence." 431 U.S. at 331. In Teamsters v. United States, 431 U.S. 321 (1977), the employers objected in a similar way to evidence that it employed a far smaller proportion of minorities than were present in the population. The employer insisted that half a dozen factors not considered in the plaintiff's analysis might have explained away that disparity, and presented an expert on statistics to criticize the plaintiff's methodology.[35] But this Court held that the plaintiff itself was under no obligation to "fine tun[e]" its statistics. 431 U.S. at 342 n. 23. See also Neal v. Delaware, 103 U.S. 370, 395 (1890).

In a case such as this in which petitioners allege they are not being given equal pay for equal work, the

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[35] See Brief for Petitioner T.I.M.E.-D.C., Inc., pp. 18-20.

allocation of the burden of proof should be the same as is applied under the Equal Pay Act. In an Equal Pay Act case, once a plaintiff has met her burden of "showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified". Corning Glass Works v. Brennan, 417 U.S. 188, 197 (1974). A demonstrable disparity in the average salary paid women and men in the same job would be sufficient to satisfy a plaintiff's burden under Corning Glass. Since the substantive standard of the Equal Pay Act and Title VII are the same in an equal-pay-for-equal-work case, that same evidence, adduced here to demonstrate the existence of racial discrimination, was also sufficient to meet plaintiffs' burden.

The same standard is entirely appropriate in a Title VII case. Here, as in Teamsters "it is ordinarily to be expected that nondiscriminatory" salary policies will result in comparable salaries for blacks and whites whom an employer itself has classified in the same position. 431 U.S. at 339 n.20. The legislative history of Title VII, moreover, demonstrates, that the Congress adopted that measure because it believed the existence of nationwide racial discrimination was established by statistics demonstrating substantial differences in the median salaries of black and white workers.[36]

The court of appeals apparently believed that statistics could be treated

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[36] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, 28 (additional views of Reps. McCulloch, et al.) (1964).

as reliable evidence only if the analysis was so refined as to rule out any plausible non-racial explanation for a demonstrated disparity. But statistical evidence need not be conclusive in order to be admissible or relevant; rather, statistical evidence, like other types of proof, need only have a "tendency to make the existence of [discrimination] ... more likely...." Fed. Rules of Ev., Rule 401. Statistical evidence which meets that standard is not, unless unrebutted, dispositive by itself of the litigation; such evidence merely shifts to the defendant the burden of adducing evidence that the disparity was caused by the application of a legitimate non-discriminatory criterion. Cf. Texas Department of

Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); Vulcan Society v. Civil Service Comm'n, 490 F.2d 387, 392 (2d Cir. 1973).

In order to provide probative statistical evidence that a challenged selection procedure is being applied in a discriminatory manner, a plaintiff must (a) identify the procedure in dispute, (b) identify the group of applicants or employees to whom that procedure is applied,[37] and (c) demonstrate a disparity

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[37] In a case where a plaintiff challenges only a selection procedure for hiring or promotions, the appropriate universe for comparison purposes is the group of applicants. Because applicant flow data is often unavailable or unreliable, the courts have properly accepted workforce statistics as evidence of the composition of the applicant group. See, e.g., Teamsters, 431 U.S. at 337 n.7. In an action regarding internal promotions, the relevant workforce, of course, is the group of employees eligible for promotion. Paxton v. Union National Bank, 688 F.2d 552, 564 (8th Cir. 1982) Where a plaintiff alleges that applicant flow is tainted by racial discrimination, the

between the racial composition of that initial group and the group ultimately selected, e.g., for hiring, promotions, cases, or jury service. The appropriate degree of statistical refinement will thus turn on the specific nature of a plaintiff's claims. Where a defendant's selection process involves a number of different factors or procedures, a plaintiff may either challenge the process as a whole, as occurred in this case, or focus his or her objection on only a specific aspect of that process. Connecticut v. Teal, 457 U.S. 440 (1982).

In Hazelwood School District v. United States, 433 U.S. 299 (1977), the government alleged there was intentional discrimination in the manner in which

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composition of the applicant group should be compared with that of the relevant workforce.

Hazelwood selected new teachers from the area pool of teachers. Because the United States did not attack Hazelwood's practice of considering only trained educators, it was that pool of trained educators, rather than the entire population, whose composition was compared with Hazelwood's hiring rate. 433 U.S. at 308-312. In Mayor v. Educational Equality League, 415 U.S. 605 (1974), where the plaintiffs alleged intentional discrimination in the selection of members of an Educational Nominating Panel, the city charter required the mayor to chose most of those members from among individuals who headed certain public and civic organizations. The plaintiffs did not attack the legality or legitimacy of this city charter requirement 415 U.S. at 620. Under those circumstances the Court held that "the relevant universe for comparison purposes

consists of the highest ranking officers of organizations and institutions specified in the city charter, not the population at large," 415 U.S. at 620-21. An asserted qualification requirement may be used to narrow the universe for comparison only if a plaintiff challenges neither the legitimacy of that requirement nor the manner in which it was applied. As a practical matter it will at times be difficult to calculate a universe of compa son which matches exactly the group to which a challenged procedure applies. Evidence regarding the composition of that group need not be conclusive; a defendant is free to offer more refined data which it believes better approximates the composition at that group.

Neither Hazelwood nor Educational Equality League, however, suggested that the plaintiffs in such cases were obli-

gated to buttress such statistics with evidence foreclosing the possibility that potential black appointees were less qualified than the whites selected. In Neal v. Delaware the lower court had assumed, in the absence of evidence to the contrary, that "the great body of black men residing in th[e] state are utterly unqualified by want of intelligence, experience or moral integrity, to sit on juries" 103 U.S. at 394. This Court refused to indulge in any such "violent assumption." 103 U.S. at 397. Neal forbade federal as well as state courts from requiring a plaintiff, as part of his or her statistical analysis, to overcome any presumption that blacks are ordinarily less skilled and capable than whites. Both Title VII and the Fourteenth Amendment forbid a public agency to rely on any such assumption in making employment decisions;

surely it is equally improper for a federal court, in resolving an employment discrimination claim, to rely on that very impermissible assumption of racial differences.[38]

In the instant case the challenged practice was the fixing of initial salaries and raises for employees holding the same position. Accordingly, the "relevant universe for comparison purposes" was all employees in the same job. The average salaries of black and white workers represented the cumulative effect of such disputed salary decisions regarding each of those employees. The resulting statistical analyses were as complete as those deemed acceptable in Teamsters,

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[38] The district judge's decision in the instant case relies in part on precisely such an assumption, arguing at length it was "common knowledge" that black college graduates were in general less educated than whites. (Pet. App. 196a-98a).

Hazelwood and Educational Equality League, and were clearly sufficient to establish a prima facie case of salary discrimination.

(2) Respondents Failed to Rebut That Prima Facie Case

The district court acknowledged that petitioners' statistical evidence was both probative and sufficient to create a prima facie case, but held that that evidence had been rebutted by respondents. (Pet. App. 130a-31a, 149a-50a) Respondents, however, did not offer statistical evidence demonstrating that the proven disparities were the result of racially neutral job related criteria for fixing or raising salaries. On the contrary, the statistics offered by respondents revealed essentially the same disparities proven by petitioners. The "defense" accepted by the trial court consisted merely of testimony that there were 9 nonracial

factors which had not been included in the statistical analyses offered by either party. (Pet. App. 133a-36a) Respondents did not offer, and the trial court regarded as entirely unnecessary, evidence that inclusion of these additional variables would in fact have eliminated the apparent disparities. On the trial court's view a defendant could conclusively rebut significant statistical evidence of racial disparities simply by offering speculation that the inclusion of other variables might have yielded a different result.

This Court has repeatedly held that such unsubstantiated speculation is entitled to no weight in rebutting a prima facie case of discrimination. In Patton v. Mississippi, 332 U.S. 463 (1947), the state suggested that the paucity of black jurors might have been due to a lack of

qualifications among black citizens. This Court observed "[I]f it can possibly be conceived that all of them were disqualified for jury service ..., we do not doubt that the State could have proved it." 332 U.S. at 469. (Emphasis added) The state's mere speculation that blacks were unqualified "wholly failed to meet" the statistical evidence offered by Patton. Id. In Dothard v. Rawlinson this Court again held that a defendant had to do more in response to such statistical evidence than merely hypothesize the existence of possible explanations. "If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made." 433 U.S. at 331. These decisions make clear that a defendant who wishes to rebut a prima facie case must offer

substantial evidence, not merely "an ingenious academic exercise in the conceivable." United States v. SCRAP, 412 U.S. 669, 688 (1973).

As Judge Phillips emphasized in his dissenting opinion in this case, the effective use of statistical evidence in a discrimination case would be impossible if such evidence could be rebutted merely by testimony that the statistical analysis did not

> include a number of other independent variables merely hypothesized by defendants .... [T]o apply such a rule generally would effectively destroy the ability to establish any Title VII pattern or practice claim by this means of proof. [I]t will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated by any multiple regression analysis that could be conceived. (Pet. App. 448a-49a).[39]

[39] Other lower courts have recognized that plaintiffs could never meet the onerous burden established by the opinion below. See, e.g., Guardians Association v. Civil Service Commission, 630 F.2d 79, 88 n.7

Judge Phillips stressed, as did this Court in Dothard, that there was no "evidence that the inclusion of other variables would in fact reduce" the disparities in the wages of blacks and whites in the same. (Pet. App. 450a) (Emphasis in original).

Lower courts, all too familiar with the speculative ingenuity of Title VII defendants, have consistently and properly refused to accept such speculation as an adequate response to statistical evidence.

> [U]nquantified, speculative and theoretical objections to the proffered statistics are properly given little weight by the trial court: "When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendants may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant . . . must either rework plaintiff's statistics

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(2d Cir. 1980).

> incorporating the omitted factors or present other proof undermining plaintiff's claims."

Trout v. Lehman, 702 F.2d 1044, 1102 (D.C. Cir. 1983), vacated on other grounds sub nom. Lehman v. Trout, 79 L.Ed.2d 732 (1984). These decisions reflect the fact that ordinarily only an employer knows what non-racial factors, if any, might have been the reasons for its actions, and only that employer has control of the evidence which would tend to substantiate or undermine that defense.

The danger of accepting such a speculation defense is well illustrated by the facts of this case. The fourth Circuit concluded there was no salary discrimination primarily because that court thought that black employees might have been earning less simply because they were concentrated in the counties in

western North Carolina that paid all their employees below average salaries. (Pet. App. 388a) But the district court found that blacks were in fact concentrated in the higher salaried counties in the eastern portion of the state. (J. App. 77; Pet. App. 48a, 110a; see C.A. 1612-15). Similarly, although the district court thought it possible that the salary disparities might have been caused by differences in performance ratings, the defendants own analysis showed that in 1975 the lower paid blacks had actually received higher ratings than their better paid white colleagues. (See n.12, supra).

To overcome the presumption created by a prima facie case, a defendant "must clearly set forth, through the introduction of admissible evidence, the reasons for" the disputed action.[40] Texas Dept. of

[40] A defendant may also attack the accuracy

Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). Where that explanation is based on the utilization by the employer of one or more selection criteria, the criteria must, of course, be job-related. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Evidence that a defendant utilizes one or more legitimate non-discriminatory criteria is not by itself sufficient; those asserted criteria could not be the "reasons for" a disputed action unless the application of those criteria would in fact have produced the

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of the raw data utilized by plaintiffs, or object on technical statistical grounds to the method by which plaintiffs analysed that data. But the mere existence of minor inaccuracies or technical flaws will not dispel the evidentiary value of statistics unless there is substantial reason to believe that the elimination of those alleged errors would have fundamentally altered the outcome of the analysis. Craik v. Minnesota State University Bd.,731 F. 2d 465, 477 n.5 (8th Cir. 1984).

result of which a plaintiff complains. Thus, although an employer does not bear the burden of proving what its actual motive was, the employer's proposed explanation simply is not an explanation of all unless the employer demonstrates that its asserted motive, if present, would have led to the employment action at issue. Turner v. Fouche, 396 U.S. 346, 361 (1970).

In an individual action, for example, a salary disparity could not be rebutted merely by evidence that an employer had a job-related policy of paying higher salaries to workers with Ph.D.'s; the employer would also have to show, of course, that the black complainant actually lacked a Ph.D., and that application of the Ph.D. rule could thus explain

his particular salary level. Similarly, in response to evidence of systematic salary discrimination, an employer does not offer evidence of the "reason for" a disparity merely by proving it uses some non-racial criteria to fix salaries; the employer must also show, by statistical[41] or other methods, that application of those racially neutral criteria to the work-force in question would yield, and thus tend to explain, the salary patterns of which a plaintiff complains.

In the instance case the respondents did not meet, or even attempt to meet, this standard. A defense witness did

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[41] The lower courts have generally regarded such more refined statistics as the most appropriate and reliable form of rebuttal evidence. Movement for Opportunity v. General Motors, Inc., 622 F.2d 1235, 1245 (7th Cir. 1980) ; Trout v. Lehman, 702 F.2d at 1102; Falcon v. General Telephone Co., 628 F.2d 369, 381 (5th Cir. 1980), rev'd on other grounds, 457 U.S. 147 (1982)

identify several non-racial criteria which respondents asserted affected salaries, but respondents made no effort to satisfy its burden of showing that these criteria were "the reasons for" the apparent salary disparity, since there was simply no evidence that an analysis including those criteria would have explained away the obvious disparities. The strong prima facie case of salary discrimination thus stood essentially unrebutted.

III. TITLE VII AND THE FOURTEENTH AMENDMENT PLACE ON PUBLIC AGENCIES A NON-DELEGABLE DUTY TO PROMOTE EMPLOYEES IN A NONDISCRIMINATORY MANNER

The evidence of discrimination in promotion showed, inter alia, that NCAES never promoted a black into a committee chairmanship for which a white male had applied. (See pp.13-17, supra). The

district court concluded that that evidence "certainly create[d] a prima facie case of discrimination". (Pet. App. 83a). The district court, relying on a somewhat unorthodox form of statistical analysis,[42] held that petitioners had failed to prove the existence of racial discrimination. The court of appeals disagreed

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[42] Both the district court and the court of appeals insisted in including in their analyses promotion vacancies for which only blacks had applied. (Pet. App. 78a-81a, 417a). Most of the black chairman included in these analyses had won their position by default when no white applied. The selection of a black applicant in such a case is clearly of no evidentiary significance to a claim that an employer discriminates in favor of whites when both blacks and white apply. Except in cases where applicant flow is tainted by discrimination, the proper focus of an analysis of a discrimination should be on vacancies for which both races applied. Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 474 (8th Cir. 1984) (women only selected when no men applied); Williams v. New Orleans Steamship Ass'n, 673 F.2d 742, 753 (5th Cir. 1982) (blacks given desirable assignments only when no whites available.)

with the methodology used by the district court. (Pet. App. 412a-416a) Rather than remand the case for the application of what it believed was the correct standard, however, the court of appeals conducted its own analysis of the record. The fourth circuit concluded that the statistical evidence "completely refuted" the claims of racial discrimination in the promotion of county chairmen. (Pet. App. 423a).

The linchpin of the fourth circuit's decision[43] was its view that both Title VII and the Fourteenth Amendment permit a public employer to delegate away its responsibility to promote its employees in a non-discriminatory manner. The county

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[43] The fourth circuit's analysis was also flawed by its refusal to focus its analysis on vacancies for which both blacks and whites had applied. See n.42, supra.

chairmen at issue in this case were undeniably NCAES employees. But the court of appeals believed NCAES had immunized itself from any liability for the selection of those employees by choosing, in many cases where blacks and whites both applied, to "recommend" applicants of both races, and to permit the county involved to make the final decision. In every case in which a county was permitted to choose between a black and a white applicant, the county chose the white,[44] a fact of which NCAES could not have been unaware. The fourth circuit held nonetheless that NCAES was "not separately responsible" for the final decisions as to who would be selected as the NCAES county chairman. (Pet. App. 412a). The only action for which NCAES was legally accountable, the

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[44] Compare chart at Pet. App. 419a et seq. with C. A. App. 1737-42.

appellate court believed, was the recommendations which it made for the vacancies. If, as actually occurred, the counties invariably preferred that NCAES hire only white chairmen, the fourth circuit held that NCAES still had no legal responsibility for that result. Thus the fourth circuit focused its own statistical analysis solely on the number of blacks and whites NCAES recommended for chairmanships, and deliberately disregarded the evidence regarding the identities of the employees who were actually promoted.[45]

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[45] Petitioners alleged that a variety of discriminatory practices had artificially reduced the number of blacks who applied for promotion to county chairman. The district court found that, prior to 1972, applicants had been individually recruited on a word-of-mouth basis, and that no notice of the existence of vacancies was given to other potentially interested employees. (Pet. App. 24a, 75a, 271a, 294a) Between 1968 and 1971 there were 23 vacancies for which only one applicant, a white, ever applied; this represented 68% of the 34 vacancies filled in those years. See Pet. App. 419a et seq. A number of

The decision below is squarely inconsistent with this Court's decision in Arizona Governing Committee v. Norris, 403 U.S. 1073 (1983). In Norris the plaintiff, a state employee, complained that the retirement plans available to her all discriminated on the basis of sex against female retirees. Arizona denied any legal responsibility for that discrimination, arguing that the state itself had never

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black employees testified that they were deterred from applying for a county chairmanship because they knew that NCAES had never promoted a black over a white male. C.A. App. 67, 68, 135, 146, 149. See Teamsters v. United States, 431 U.S. 324, 365 (1977). Of the 289 applications for promotion filed from 1968 to 1981, only 31, or 10.7%, were from blacks, although blacks comprised over 25% of the employees eligible for promotion. Even if, as the fourth circuit believed, there was no discrimination in recommendations, the court of appeals erred in failing to address these substantial claims that other discriminatory practices had reduced the number of blacks applying for, and thus receiving appointments as, county chairman.

discriminated, but had merely delegated to a number of private annuity companies the responsibility for developing and offering retirement plans to state employees. Since no state official had engaged in discrimination, Arizona argued, the state had no legal responsibility for discrimination by those third party firms. This Court rejected that contention, holding, in Justice O'Connor's apt phrase, that an employer could not "escape Title VII's mandate by using a third-party" to make its employment decisions. 463 U.S. at 1109 (concurring opinion).

The majority emphasized in Norris that state employees in Arizona were not free to deal with any annuity company of their choice. 463 U.S. at 1086-87. Rather, Arizona itself had specifically selected the firms from which retirement plans could be obtained, and all of those

plans discriminated against women.[46] Here, as in Norris, NCAES specifically selected the officials who were to have a role in filling each particular vacancy. NCAES, not black applicants, decided to refer the disputed promotion decisions to county officials, and NCAES cannot disclaim responsibility for the discriminatory action invariably taken by those officials. Norris reasoned, more broadly, that under Title VII "employers are ultimately responsible for the compensation, terms, conditions, [and] privileges of employment." 463 U.S. at 1089. (Emphasis added). "We do not think it

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[46] "Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurers' options." 463 U.S. at 1089. (Emphasis added).

makes any ... difference ... that the employer engaged third parties to provide a particular benefit rather than directly providing the benefit itself." 463 U.S. at 1089 n.21. The selection of particular individuals for promotion is an even more important "aspect of the relationship between the employer and employees" than the fringe benefits at issue in Norris, 463 U.S. at 1089 n.21.

The purported delegation of promotion decisions provides also no defense to petitioners' constitutional claims, although for somewhat different reasons. A state's responsibility to refrain from involvement in intentional racial discrimination is not limited to cases in which a state officially personally engages in racially motivated conduct; in some instances interrelated activity of a state and third parties constitutes state action

and is thus subject to the requirements of the Fourteenth Amendment. See, e.g., Adickes v. S. H. Kress Co., 398 U.S.144 (1970); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

This Court has repeatedly held that the constitutional prohibition against discrimination extends to all individuals carrying out state functions, regardless of whether those individuals are technically employees of the state. Thus the Fifteenth Amendment, which prohibits a state from denying the right to vote on account of race, also prohibits a state from delegating control of the franchise to discriminatory third parties. In Smith v. Allwright, 321 U.S. 649 (1944), for example, the state of Texas had no statute forbidding blacks from voting, but delegated to each political party authority to decide the qualifications of

participants in party primaries. The Democratic party adopted a rule permitting only whites to vote in party primaries, and the state disavowed any responsibility for that discrimination. This Court disagreed, holding the state electoral system gave to those discriminatory primaries a decisive role in the selection of state officials, and thus "endorse[d], adopt[ed] and enforce[d] the discrimination against Negroes. This is state action." 321 U.S. at 664. The Court reached a similar conclusion when Texas permitted a private all-white organization known as the Jaybirds to conduct primary elections, the victors in which invariably won the succeeding Democratic primary and general election. Terry v. Adams, 345 U.S. 457 (1953).

Just as Texas could not with impunity delegate to third parties effective control over who could vote in state elections, so too North Carolina cannot with impunity delegate to third parties effective control over the selection of state employees. The selection of NCAES county chairmen is inherently a state function, and those selections remain state action, and actions for which NCAES is accountable, regardless of whether the individual clothed with the state power to make that decision is an employee of North Carolina, of a county,or of the infamous Jaybird Party.[47]

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[47] See Meredith v. Fair, 298 F.2d 696, 701-02 (5th Cir. 1962); Bell v. Georgia Dental Ass'n, 231 F. Supp. 299 (N.D. Ga. 1964); "Perpetuation of Past Discrimination", 96 Harv. L. Rev., 828, 848-53 (1983).

Neither the Title VII nor constitutional claims in this case are controlled by General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982). That decision held that section 1981, which forbids only intentional racial discrimination in employment, does not create a non-delegable duty, and that the contractors in that case could not be held liable merely because they utilized the services of a racially discriminatory union hiring hall. 458 U.S. at 391-97. An essential premise of General Building Contractors was that section 1981 applied only to instances of intentional discrimination.[48] Title VII, on the other hand, forbids as well practices which have a racially discriminatory effect. Griggs

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[48] "Our earlier holding that § 1981 reaches only intentional discrimination virtually compels this conclusion." 458 U.S. at 396.

v. Duke Power Co., 401 U.S. 424 (1971). The delegation of employment decisions to a discriminatory third party has just such a discriminatory impact. Here counties given a choice between black and white applicants always chose the white; thus NCAES' practice of giving counties a role in that decision had the effect of excluding 100% of all blacks seeking positions for which whites had also applied.

The Fourteenth Amendment, like section 1981, reaches only intentional racial discrimination by a state. But the standards governing what constitutes state action under that Fourteenth Amendment are clearly different than the principles that were applied to a private employer in General Building Contractors. This Court's decisions regarding the scope of state action have consistently and correctly

turned on the unique role of government in American society, and on the peculiar historical interactions of public and private institutions. General Building Contractors, on the other hand, relied on the standards traditionally utilized in ordinary private commercial litigation: respondent superior, the law of agency, and the principles of the National Labor Relations Act. 458 U.S. at 392-94. General Building Contractors did not purport to apply any of this Court's constitutional decisions regarding the scope of state action, and did not intimate any intent to displace those decisions with the quite different rules appropriate in a commercial setting.

For constitutional purposes, moreover, counties are subdivisions of a state, and the conduct of a county official is as much state action as the

activities of the governor. The fourth circuit's apparent assumption that a state could evade its constitutional obligation by balkanizing among a variety of state and local officials responsibility for a particular program was rejected by this Court in Wallace v. United States, 389 U.S. 215 (1967), aff'g Lee v. Macon County, 267 F. Supp. 458 (M.D. Ala. 1966) (joint state and local operation of schools).

NCAES was thus legally responsible for discrimination in the selection of county chairmen, regardless of the extent to which the personnel officials involved were paid by the state or by a county. The fact that NCAES never promoted a black to a position for which a white had applied was clearly sufficient to create a prima facie case of discrimination. The trial court repeatedly noted that many among the

named plaintiffs were well qualified to serve as county chairmen. (Pet. App. 231a, 236a n.76 [sic], 242a, 245a). One unsuccessful black applicant had previously served as an acting county chairman, and several of the rejected black applicants were ultimately named county chairman, although not until they sought a vacancy for which no white male had applied. (Pet. App.243a, 258a, 273a, 275a, 281a, 308a). Under these circumstances petitioners' prima facie case of intentional discrimination stood essentially unrebutted.[49]

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[49] The trial court recognized that, had it sustained the claim of classwide discrimination, even blacks who were not named plaintiffs "would have been entitled to relief as members of the class." (Pet. App. 218a n.70 [sic]). Similarly, in addressing claims that blacks were deterred from applying, the trial court attached decisive importance to its views that any fears of discrimination were simply groundless. (Pet. App. 99a).

IV. THE COURTS BELOW ERRED IN HOLDING RESPONDENTS HAD NO OBLIGATION TO DISESTABLISH A STATE CREATED SYSTEM OF GOVERNMENT SPONSORED SINGLE RACE 4-H AND EXTENSION HOMEMAKER CLUBS

(1) The History of the Clubs

The essential facts with regard to this issue are not in dispute.[50] Prior to

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[50] Petitioners included actual and potential members of 4-H and extension homemaker clubs, who contended that NCAES's practices violated their statutory and constitutional rights. Petitioners also included NCAES employees who are required by NCAES to service those single race clubs. If, as petitioners contend, NCAES has unfulfilled legal obligations related to the racial composition of these clubs, then NCAES is requiring petitioners to violate federal law. Continued violation of federal law might conceivably subject petitioners to civil liability. Scheuer v. Rhodes, 416 U.S.232 (1974). That black employees should be required to participate in unlawful discriminatory practices to which they understandably object violates their own rights as well as those of other victims. Abood v. Detroit Board of Education, 431 U.S. 209,232-37 (1977). Under these circumstances the fourth circuit's concerns regarding petitioners' standing were clearly unfounded. See also Craig v. Boren, 429 U.S. 190, 194-96 (1976).

1965 both the 4-H and extension homemaker clubs were operated on a strictly de jure segregated basis.[51] NCAES deliberately organized the clubs on racial lines, and NCAES personnel were assigned to clubs on a strictly racial basis. In 1965 NCAES announced that existing clubs could no longer reject an applicant on the basis of race. But where single-race clubs existed side by side in the same racially mixed community, NCAES took no steps to require or encourage the merger of those clubs. Single race clubs have continued to this day to exist in racially mixed communities throughout the state, and until at least 1974 NCAES continued to assign personnel to those clubs on a racial basis.[52]

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[51] See Tr. 4201-04; GX 115, p. 4; Pet. App. 37a.

[52] GX 21, 23, 35; C.A. App. 1834.

The only policy adopted by NCAES for dealing with the large number of single race clubs it had created was the freedom of choice plan established in 1965. In March, 1977, NCAES did briefly adopt a directive requiring that a "reasonable effort" be made to integrate new single race clubs;[53] that directive was rescinded a month later, however, because state officials believed NCAES was "essentially 'sheltered' from discrimination issues until the pending litigation is settled" and because "counsel advised that a court order resulting from the civil rights suit would likely require steps in addition to any affirmative action measures then being implemented."[54] In 1979 NCAES acknowledged

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[53] C.A. App. 1839; see also J. App. 135-36 (rescinded 1974 initiative).

[54] J. App. 142; C.A. App. 1845-46; see also J. App. 97-98.

that its past approach had been unsuccessful, and once more adopted a proposal to require "all reasonable efforts" to integrate the clubs.[55] Again, however, that measure was rescinded at the request of the attorney representing NCAES in the instant litigation,[56] who explained that any such steps would undermine his contention at trial that no affirmative measures could successfully integrate the clubs.[57] In sum, NCAES has refused to take any steps beyond freedom of choice, not because it believed freedom of choice had been successful or because NCAES concluded there were no workable alternatives, but solely because NCAES' attorney repeatedly advised the agency that any successful

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[55] J. App. 147-50; C.A. App. 1850, 1855, 1959-62.

[56] Tr. 4284.

[57] J. App. 157-58; C.A. App. 1904.

efforts to integrate the clubs would undermine its position in the instant litigation.

The impact of the freedom of choice plan was accurately described by Judge Phillips as "minimal." (Pet. App. 471a). In 1965, prior to the adoption of the freedom of choice plan, there were 1,474 all-white 4-H clubs; in 1980, after 15 years of freedom of choice, there were 1,348 all-white clubs.[58] Between 1972 and 1980 the number of single race clubs in racially mixed communities declined by less than 2%.[59] In the last year for which NCAES kept statistics, 98.8% of all the extension homemaker clubs were either all-white or all-black.[60] The NCAES

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[58] C.A. App. 1806; GX 11; Pet. App. 472a.

[59] C.A. App. 1807, 1813; Pet. App. 472.

[60] C.A. App. 1797-1805; J. App. 103. NCAES did not contend below that the degree of integration of these clubs has increased

director testified that under that agency's present policies it would take "forever" to eliminate all the single race clubs.[61]

The number of single race clubs is not solely the result of the pre-1965 de jure system. Since 1965 a substantial number of new single race clubs have been organized in racially mixed communities. As Judge Phillips observed, "[t]hat chance alone could account for their single race composition is not suggested by anyone." (Pet. App. 476a). NCAES acknowledged that the racial makeup "is determined by the local volunteer" who organizes the club.[62] NCAES officials declined to interfere with organizing along racial lines because they

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since it stopped collecting detailed statistics.

[61] Tr. 1165-66.

[62] Deposition of January 30, 1973, p. 74.

believed such recruiting increased total membership. The director of the 4-H program asserted that if the single-race clubs were merged, and individuals were thus denied the opportunity to join an all-white or all-black club, many members of the public would refuse to join the clubs or serve as volunteer leaders.[63] If, as the director testified, many volunteer organizers simply would have refused to participate in integrated clubs, it is of course inconceivable that those white organizers would have actually recruited black members.

(2) The Applicable Legal Requirements

Both courts below believed that NCAES had no legal and constitutional obligation other than to assure that no

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[63] Tr. 4997-99, 5121-22; see also J. App. 99.

applicant was rejected for membership in a club because of his or her race. (Pet. App. 158a-63a, 165a-85a, 424a n.128). Petitioners do not contend that applicants have been rejected on a racial basis since 1965. Because of their view of the law, neither the district court nor the court of appeals found it necessary to decide whether, as petitioner claimed, there had been intentional racial discrimination in recruiting, or to consider whether NCAES had actually made any progress in dismantling the de jure system it created prior to 1965.

This case can readily be resolved on a non-constitutional basis. See Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). The applicable Agriculture Department Title VI regulations clearly require NCAES to take effective measures

to disestablish the pre-1965 de jure system. 7 C.F.R. § 15.3(b)(6)(i) provides:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race ... the recipient must take affirmative action to overcome the effects of prior discrimination.

Section 15.3(b)(6)(i) clearly obligates NCAES to do more than adopt a freedom of choice plan that fails. Although petitioners expressly relied on section 15.3(b)(6)(i) in the proceedings below, as did Judge Phillips (Pet. App. 474a), the fourth circuit majority inexplicably failed to address the issues raised by this regulation. (See Pet. App.424a n.128).

In addition, intentional racial discrimination in the recruiting of participants in a federally assisted program violates the express commands of

Title VI itself. Where organizers recruit only whites to join a state supported 4-H or extension homemaker club, while deliberately refusing to recruit blacks, blacks are clearly not afforded the same opportunity as whites to join those clubs or to benefit from the federally assisted programs those clubs provide. As Judge Phillips noted, the district court failed to address the issues raised by the evidence of discriminatory recruitment. (Pet. App. 475a-79a)

Were this Court to reach the constitutional issues presented by this case, the result would be controlled by Green v. School Board of New Kent County, 391 U.S. 430 (1968). Green held that freedom of choice plans were only acceptable if they in fact disestablished the de jure system that the state had created: "The burden on a school board today is to come forward

with a plan ... which promise[s] realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools". 391 U.S. at 437. Since NCAES itself created the original de jure segregated club system, NCAES was under the same affirmative obligation as the school board in Green to adopt a remedy that would effectively disestablish that system. During the last two decades NCAES' freedom of choice plan has proved as unsuccessful as the freedom of choice plan in Green itself. The number of all-black and all-white clubs supported by NCAES today is virtually identical to the number that existed in the heyday of de jure segregation. Under these circumstances Green clearly requires that NCAES do more.

A finding of liability by this Court will not, as the district court seems to have feared, require precipitous or destructive judicial action. The fashioning of a remedy for this problem will require considerable care and cooperation among all parties. It may be necessary to explore a variety of remedial devices before the best approach can be found. But surely, a third of a century after Brown, and 22 years after the adoption of Title VI, the time has come to at least begin the process of changing "black" and "white" state supported clubs into just clubs.

V. THE LOWER COURTS ERRED IN REFUSING TO CERTIFY THIS CASE AS A CLASS ACTION

Petitioners moved prior to trial for an order certifying this case as a class action. Petitioners requested that the

district court certify three distinct classes: (1) a plaintiff class of all black NCAES employees, (2) a plaintiff class of all black members and potential members of 4-H and extension homemaker clubs, and (3) a defendant class consisting of the 100 counties that jointly operated the extension service programs with NCAES. The district court concluded that certification was improper as a matter of law;[64] in the fourth circuit the majority opinion declined to uphold the district judge's reasoning (Pet. App. 372a-73a), and Judge Phillips urged at length that the lower court opinion was incorrect. (Pet. App. 426a-433a). A majority of the fourth circuit also concluded, however, for reasons somewhat

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[64] Pet. App. 33a-48a; J. App. 78.

different than those of the district court, that certification was improper. (Pet. App. 365a-78a).

The trial court held that class certification was never permissible in a Title VII action if the EEOC or United States had also filed a pattern and practice suit; the trial judge believed this prohibition was established by General Telephone Co. v. EEOC, 446 U.S. 318 (1980). (Pet. App. 45a-46a). As Judge Phillips correctly noted, the trial court's decision literally stood General Telephone on its head. (Pet. App. 432-33a). General Telephone refused to require in pattern and practice actions that the government be certified as a representative of class of alleged victims. This Court reasoned that, if that were done, the result of the government litigation would be binding on all

affected discriminatees, and would thus preclude them from bringing on their own an individual or class action. Such a result would be inconsistent with the intent of Congress to create parallel and overlapping remedies against discrimination. 446 U.S. at 333. The effect of the district court decision here led to precisely the result condemned in General Telephone, converting the mere existence of a government pattern and practice suit into a bar to any private class action, and requiring potential class members to look only to the government, not to any private action, for relief.

The trial judge also believed that controlling fourth circuit precedent absolutely precluded certificaton of a class that included employees who worked at different locations. (Pet. App. 43a-44a) As Judge Phillips explained at

length, neither previous fourth circuit decisions nor Rule 23 establish any per se rule precluding certification of a class merely because employees may work at different facilities. (Pet. App. 427a-432a). The fact that potential class members are employed at different plants is no more decisive than the fact that they work on different floors in the same building, or that they were subjected to discrimination on different dates. The same Rule 23 requirements apply, and could in fact be satisfied, regardless of whether the alleged discrimination may have occurred at a variety of locations or on a variety of dates. Of course, to be encompassed in a single class action two workers must have more in common than employment by the same institution; but where common questions of law or fact exist, and the other Rule 23 requirements

are met, it is of no independent significance whether those employees work at opposite sides of a room or at opposite ends of a state.

Although the district court did not clearly explain its refusal to certify the class of actual and potential club members, that decision appears rooted in the trial court's views of the merits of the clubs issue. The district court asserted that the club plaintiffs "presumably" sought to lead "a class of black[s] allegedly denied membership in all white ... clubs" (Pet. App. 40a). Finding no evidence that club applicants had actually been rejected on the basis of race, the trial court concluded that neither the plaintiffs nor anyone else was a member of the proposed class. But the legal claim adduced by the club plaintiffs was that, as a result of allegedly unlawful prac-

tices by NCAES, those plaintiffs and the proposed club-related class had as a practical matter been denied any opportunity to join multiracial 4-H and extension homemaker clubs. Certification was obviously appropriate to decide the common legal questions presented with regard to the legality of those disputed practices.

The fourth circuit majority believed that a party seeking certification was obligated to demonstrate the existence of a "legally cognizable wrong" affecting the class. (Pet. App. 372a). This case, of course, presents a variety of disputed class-wide practices, but the court of appeals, after considering the legality of each of those practices, concluded on the merits that the disputed practices were lawful, and thus involved no "legally cognizable wrong." Petitioners alleged a

class-wide practice of perpetuating pre-1965 intentional wage discrimination; the fourth circuit denied certification as to that issue because it believed the practice to be lawful. (Pet. App. 369a, 380a-82a). Petitioners alleged that the state had a nondelegable duty to select County Chairmen on a racially neutral basis; the fourth circuit denied certifications as to that issue because it believed there was no such duty. (Pet. App. 369a-70a). Petitioners alleged that the continued operation of several thousand single-race 4-H and extension homemaker clubs violated both the Constitution and federal law; certification was denied on the ground that the fourth circuit believed the operation of those clubs to be entirely legal. (Pet. App. 370a-71a).

The fourth circuit inexplicably assumed that class certification was not proper until and unless a court had held that the proposed class claims were meritorious. But the language of Rule 23 establishes no such requirement. On the contrary, certification is appropriate when there is a dispute regarding whether a defendant has engaged in a legally cognizable class-wide wrong. The resolution of that dispute should precede, not follow, class certification. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). Rule 23 is available for the litigation of common issues of law as well as common issues of fact. The decision below that there were no "legally cognizable wrongs" constitutes, not a finding that there were no common issues of fact and law, but an adverse resolution of

those very common issues. Eisen forbids denial of class certification on such a basis.

The issues of law addressed by the fourth circuit, and presented in this Court, were common as well to the proposed defendant class of counties. The practices described in parts I-IV of this brief were carried on statewide; there is no suggestion, for example, that the effects of pre-1965 salary discrimination were eliminated in that year in some counties although not others. The counties were jointly and severally liable for these statewide practices. The district court found that the operation of each extension service office was a "partnership" between NCAES and the county (J. App. 77, 161), that the workers in each office were "joint employees" of NCAES and the county (J. App.77, 161), and that NCAES and each

county"jointly" determined the promotions and salaries in each office as well as the county's contribution to those salaries. (J. App. 77, 162, 163; Pet. App. 21a, 24a, 77a, 122a). The officials who engaged in discrimination in the conduct of that joint enterprise within a given county acted with the authority of both NCAES and the county, and both entities are legally accountable for that unlawful conduct. The circumstances of this case are substantially the same as those in the defendant class action upheld by this Court in Lee v. Washington, 390 U.S. 333 (1968), aff'g Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966).

This certification issue remains of continuing importance. The United States no longer presses all of the issues which all plaintiffs raised at trial and which petitioners still pursue in this Court.

The Department of Justice has an avowed policy of declining to seek certain forms of affirmative injunctive relief frequently sought by private plaintiffs. The limitations period applicable to the governments claim in this case may be different than that which applies to the private class action. Thus a denial of certification would, as a practical matter, prevent at least some class members from receiving relief to which they would otherwise be legally entitled.

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides, in pertinent part, "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

Section 601 of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer --

> (1) to fail or refuse to hire ... any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,. or national origin....

Section 706(e) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), provides in pertinent part:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred....

The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill,

> effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of an employee.

Section 15.3(b)(6)(1), 7 C.F.R., provides in pertinent part:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race ... the recipient must take affirmative action to overcome the effects of prior discrimination.

Supreme Court, U.S.
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Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTIONS PRESENTED

1. Whether black state employees establish a claim under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by identifying current salary disparities between themselves and white employees holding the same jobs and demonstrating that such disparities result from a pre-1965 state policy of paying blacks lower salaries than whites.

2. Whether the court below was incorrect in concluding that the statistical evidence of salary disparities in this case failed to meet the petitioners' burden of accounting for variables which ought to be reasonably viewed as determinants of salary.

3. Whether respondents are liable under Title VII, on the basis of their joint responsibility for final selections of employees to fill county chairman positions, for discrimination in those selections.

4. Whether, in providing financial assistance to voluntary single-race clubs, respondents comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment by requiring that membership in those clubs be open to all without regard to race.

5. Whether a plaintiff class should have been certified in this case.*

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* This question does not affect the government's interests; it is accordingly not addressed in this brief.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	3
Summary of argument	12
Argument:	
I. Black state employees establish a claim under Title VII by identifying current salary disparities between themselves and white employees holding the same jobs and demonstrating that such disparities result from a state policy before 1965 of paying blacks lower salaries than whites	14
II. The regression analyses showed racial discrimination, and respondents did not refute that showing	21
A. In order to establish a prima facie of salary discrimination, a regression analysis must control for factors that normally affect salary	22
B. The court of appeals erred in analyzing the statistical proof offered in this case	28
III. The service retains joint responsibility for the selection of county chairmen, and is therefore liable under Title VII for discrimination in those selections	35
IV. Prior segregation in the 4-H and extension homemaker clubs was fully cured by respondents' adoption of a genuinely nondiscriminatory admissions policy	37
Conclusion	50

TABLE OF AUTHORITIES

Cases: Page

Acha v. *Beame*, 570 F.2d 57 17
Alabama State Teachers' Ass'n v. *Alabama Public School & College Authority*, 289 F. Supp. 784, aff'd, 393 U.S. 400 49
Alexander v. *Holmes*, 396 U.S. 19 41
American Tobacco Co. v. *Patterson*, 456 U.S. 63.... 17, 20
Atonio v. *Wards Cove Packing Co.*, 768 F.2d 1120.. 36
Bartelt v. *Berlitz School of Language of America, Inc.*, 698 F.2d 1003, cert. denied, 464 U.S. 915.. 19
Berry v. *Board of Supervisors of Louisiana State University*, 715 F.2d 971 19
Bowman v. *County School Board*, 382 F.2d 326.... 47
Brown v. *Bd. of Educ.*:
347 U.S. 483 40
349 U.S. 294 ..... 40, 41
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449.. 38, 47
Corning Glass Works v. *Brennan*, 417 U.S. 188 20
Cox v. *Stanton*, 529 F.2d 47 11
Dayton Bd. of Educ. v. *Brinkman*:
433 U.S. 406 ..... 40-41, 45
443 U.S. 526 48
Dothard v. *Rawlinson*, 433 U.S. 321 26
Dumas v. *Town of Mount Vernon*, 612 F.2d 974.... 17
Eastland v. *Tennessee Valley Authority*, 704 F.2d 613 25
Farmer v. *ARA Services, Inc.*, 660 F.2d 1096..... 35-36
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 ..... 22, 26
Gayle v. *Browder*, 352 U.S. 903..... 49
General Building Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375 36
Goss v. *Bd. of Educ.*, 373 U.S. 683 48
Green v. *School Board*, 391 U.S. 430....41, 43, 46, 47, 48, 49
Griffin v. *Carlin*, 755 F.2d 1516 25
Guardians v. *Civil Service Commission*, 463 U.S. 583 38
Hall v. *Ledex, Inc.*, 669 F.2d 397 19

Cases—Continued: Page

Hazelwood School District v. *United States*, 433 U.S. 299 ..... *passim*
Holmes v. *City of Atlanta*, 350 U.S. 879 49
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 16, 20, 22, 25, 26, 27
Jenkins v. *Home Insurance Co.*, 635 F.2d 310 18
Keyes v. *School District No. 1*, 413 U.S. 189 ..... 31, 40
Kim v. *Coppin State College*, 662 F.2d 1055 18
Lamphere v. *Brown University*, 685 F.2d 743 19
Mayor of Baltimore v. *Dawson*, 350 U.S. 877 49
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 26
McDonald v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 36
Milliken v. *Bradley*:
418 U.S. 717 ..... 40, 41, 49
433 U.S. 267 ..... 40, 41
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 40
Monroe v. *Board of Commissioners*, 391 U.S. 450 .. 46, 47, 48, 49
Muir v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971 49
Pasadena Bd. of Educ. v. *Spangler*, 427 U.S. 424 .. 40, 45, 46
Patterson v. *American Tobacco Co.*, 586 F.2d 300 .. 17
Perez v. *Laredo Junior College*, 706 F.2d 731 19
Pullman-Standard v. *Swint*, 456 U.S. 273 ..... 17, 20
Raney v. *Bd. of Educ.*, 391 U.S. 443 46
Robinson v. *Lorillard Corp.*, 444 F.2d 791, cert. dismissed, 404 U.S. 1006 36
Satz v. *ITT Financial Corp.*, 619 F.2d 738 19
Segar v. *Smith*, 738 F.2d 1249, cert. denied, No. 84-1200 (May 20, 1985) 25, 34
Spencer v. *Kugler*, 404 U.S. 1027 40
St. Marie v. *Eastern R.R. Ass'n*, 650 F.2d 395 ..... 25, 27
Swann v. *Bd. of Educ.*, 402 U.S. 1 ..... 40, 41, 42, 45, 46, 47
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 ..... 22, 25, 26, 27
Trout v. *Lehman*, 702 F.2d 1094, rev'd, 465 U.S. 1056 25
United Air Lines, Inc. v. *Evans*, 431 U.S. 553 .... 10, 12, 14, 15, 16, 17, 18, 19

Cases—Continued: Page

United States Postal Service Board of Governors v. *Aikens*, 460 U.S. 711 ..... 28, 33
Valentino v. *U.S. Postal Service*, 674 F.2d 56..... 25
Washington v. *Davis*, 426 U.S. 229 40
Wilkins v. *University of Houston*, 654 F.2d 388.... 25

Constitution, statutes and regulation:

U.S. Const. Amend. XIV 4, 38, 40
Civil Rights Act of 1964, 42 U.S.C. 1981 *et seq.*:
Tit. VI, § 601, 42 U.S.C. 2000d 2, 4
Tit. VII, 42 U.S.C. 2000e *et seq.*:
§ 703, 42 U.S.C. 2000e-2 4
§ 703(a)(1), 42 U.S.C. 2000e-2(a)(1) 2
§ 703(h), 42 U.S.C. 2000e-2(h) 17
Equal Pay Act, 29 U.S.C. 206 20
42 U.S.C. 1981 4
7 C.F.R. 15.3(b)(6)(i) 38

Miscellaneous:

Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442 (1973)..... 28
Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702 (1980) 23, 24, 26

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 346a-481a)[1] is reported at 751 F.2d 662. The opinions of the

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[1] "Pet. App." refers to the separately bound appendix filed with the petition in No. 85-93. In quoting materials from this appendix, we have corrected typographical errors in the filing; those corrections are indicated by brackets. "Supp. Pet. App." refers to the supplementary appendix bound with the petition in No. 85-428. "J.A." refers to the separately bound appendix filed with this brief. "C.A. App." refers to the 10-volume court of appeals appendix, 10 copies of which have been lodged with this Court. "C.A. Br." refers to the Brief for the United States filed in the court of appeals, 10 copies of which have also been lodged with this Court.

district court (Pet. App. 3a-207a, 216a-345a) are unreported.

JURISDICTION

The judgment of the court of appeals (Supp. Pet. App. 1a-3a) was entered on December 10, 1984. Rehearing was denied on April 15, 1985 (Pet. App. 482a-483a). On July 5, 1985, the Chief Justice extended the Government's time for filing a petition for a writ of certiorari to and including September 12, 1985. The petition in No. 85-93 was filed on July 15, 1985, and the petition in No. 85-428 was filed on September 12, 1985. Both petitions were granted on November 12, 1985 (J.A. 181-182). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), are reproduced at pages 3-4 of the petition in No. 85-93.

STATEMENT

1. The North Carolina Agricultural Extension Service (the Service) provides services to state residents involving the dissemination of "useful and practical information on subjects relating to agriculture and home economics," *e.g.*, through educational programs for farmers and sponsoring 4-H and extension homemaker clubs (Pet. App. 7a, 12a-20a). It is funded jointly by the United States Department of Agriculture, the State of North Carolina, and the various counties in the State (Pet. App. 7a-8a). The Service employs agricultural extension agents, professional employees at the county level, of which there are three ranks: full agent, associate agent, and assistant agent (Pet. App. 17a). The three ranks perform "essentially the same types of tasks," but the full agents have more responsibility and are expected to maintain higher performance levels than associate

agents, the intermediate position, or assistant agents, the entry level position (*ibid.*).[2]

Until August 1965, the Service was divided into "a white branch * * * and a Negro branch * * * composed entirely of black personnel and serv[ing] only black farmers, homemakers and youth" (Pet. App. 27a). Although black and white county agents had identical responsibilities and job descriptions (Pet. App. 29a), "[t]he salaries of black agents in the segregated system were lower than the salaries of their white counterparts" (Pet. App. 30a). The two branches of the Service were merged on August 1, 1965 (Pet. App. 30a, 359a), and a single minimum entry level salary was adopted for all agents hired after the merger.[3]

Shortly before the merger, the position of county extension chairman was created by making the white county agents responsible for coordinating the entire extension program in their respective counties (C.A. App. 1001-1002, 1783). In November 1972, the Service introduced a system of announcing job vacancies and accepting applications for county chairman positions (Pet. App. 24a-25a, 75a).[4] Applicants who possess the minimum qualifications for county chairman are interviewed by Service officials, who then make a recommendation to the board of county commissioners (Pet. App. 25a-26a, 76a-

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[2] In this brief we will use the term "agents" to refer collectively to employees in all three ranks.

[3] Newly hired agents with advanced degrees, prior relevant experience, or particularly needed skills are paid more than the minimum. Each agent's salary also reflects a contribution by the county in which he is employed, the amount varying from county to county. Pay increases awarded by the county or the state may be in the form of an equal sum to each employee or as a percentage of the salary. Finally, the state and some counties provide for merit pay increases and increases to offset inflation (Pet. App. 109a-115a, 360a-362a).

[4] Before that time, county chairmen were selected jointly by the Service and the board of county commissioners concerned from a list of possible candidates prepared by the Service (C.A. App. 165, 485-488; Pet. App. 101a).

77a). The county generally accepts the recommendation (C.A. App. 171), but "all appointments are worked out jointly between the Extension Service and the commissioners and no official action can be taken unilaterally by either party with respect to filling a vacancy" (Pet. App. 77a).

Prior to 1965, the Service had established separate all-white and all-black 4-H and extension homemaker clubs, and many clubs presently have only members of a single race (J.A. 103; C.A. App. 1807), although the number of integrated Clubs increased nearly three-fold between 1972 and 1980 (C.A. App. 1807, 180, 1140). After 1965, the Service requested a formal assurance from each club that it would not discriminate on the basis of race, color, or national origin (GX 115, at 3). The Service has also published in the media its policy that all voluntary clubs be organized without regard to race, instructed its agents to encourage formation of new clubs on that basis (Pet. App. 181a), and integrated all other aspects of the 4-H program.

2. a. This suit was initiated in November 1971 by more than 50 black employees of the Service, alleging, inter alia, intentional racial discrimination in employment and services in violation of the Fourteenth Amendment to the Constitution, 42 U.S.C. 1981, and Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (Pet. App. 3a-4a). After Title VII of the Civil Rights Act of 1964 became applicable to the states in 1972, the complaint was amended to include claims under Section 703 of that Act, 42 U.S.C. 2000e-2, and the United States intervened in the action. The complaint in intervention, as amended, also alleged racial discrimination against black employees and recipients of services in violation of the Fourteenth Amendment, Title VI, and Title VII (Pet. App. 5a, 35a).

Plaintiffs asserted intentional racial discrimination in various incidents of employment, including salaries, job assignments and promotions, and in the selection of county chairmen, as well as in the continued support of

single-race 4-H and extension homemaker clubs (Pet. App. 49a-51a). The employment-related claims included individual claims of discriminatory treatment as well as allegations of intentional patterns and practices of discrimination (Pet. App. 49a-51a, 227a-339a).

b. The case was tried to the court for 10 weeks starting in December 1981 (Pet. App. 4a). During discovery, the defendants had asserted that four factors were determinative of salary: education, tenure, job title and job performance (GX 159, at 90, 96 (Oct. 16, 1981, Deposition of Dr. Paul Dew, Assistant Director of County Operations)). At trial, the evidence introduced by the United States included multiple regression analyses comparing the salaries of black and white county agents in 1974, 1975 and 1981. Certain of these regressions used four independent variables—race, education, tenure, and job title—and showed a statistically significant racial effect for 1974 (C.A. App. 1601, 402-403) and 1975 (C.A. App. 1589, 416), and a smaller racial effect, without statistical significance, for 1981 (C.A. App. 1578).[5]

The district court indicated that, based on this evidence, plaintiffs would prevail unless defendants produced statistical evidence demonstrating that the addition of other variables would reduce or eliminate the racial effect.[6] Accordingly, defendants also introduced multiple regression analyses, for 1975 and 1981. Certain of these regressions used the same variables as plaintiffs' regressions, but excluded county chairmen from the data base, and these analyses produced results similar to plain-

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[5] These results were corroborated by other evidence, including an exhibit, based on January 1973 payroll data for 23 counties, that showed 29 black employees earning less than whites in the same county with comparable or lower positions and the same or less tenure and education (C.A. App. 1563-1567).

[6] The court told respondents' counsel (C.A. App. 525):

> [I]f under the law all those things should have been cranked in there, and if after cranking them in you get a different result, then you win. If they ain't got any business in there or if you've cranked them in and it still doesn't show it, then they win.

tiffs' (C.A. App. 1716 (analyses), 1711-1712, 1691-1692). In addition, defendants presented regressions that added quartile rank, a measure of job performance, as an independent variable.[7] Doing so for 1981 produced statistically insignificant racial disparities, but doing so for 1975 *increased* the racial effect, and this result was statistically significant (C.A. App. 1716 (analysis 6), 1713-1714)).

Plaintiffs also introduced evidence showing that although the size of the 4-H club system has varied considerably over the years, there have been more than 1,000 all-white clubs each year since 1972 (C.A. App. 2237; GX 11), and more than 850 single-race clubs in communities identified by defendants as "ethnically mixed" (C.A. App. 1807). The extension homemaker clubs also remain largely single-race clubs (J.A. 103-113; C.A. App. 1806-1807; Tr. 941-942, 1524-1525, 2390, 2449-2450).[8]

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[7] Quartile rank is used in determining merit salary increases (see note 32, *infra*). The government did not use this variable in its regression analyses because the quartile system was itself under attack in this suit as racially discriminatory (see Pet. App. 391a-400a).

[8] The government also introduced statistical and other evidence relating to the selection of county chairmen. The first black chairman was not selected until March 1971, after 151 white chairmen had been selected (J.A. 127; GX 75). Between November 1972, when the first vacancy announcement appeared (see note 4, *supra*) and October 1981, 72 (93.5%) of the 77 county chairmen selected were white and 5 (6.5%) were black (J.A. 114-124; C.A. App. 919-920). No black was selected for any of the 31 positions filled between November 1972 and July 1, 1976, although 12 (10.3%) of the 116 applicants for those positions were black. Several blacks testified that they had not sought chairmanships because they believed it would be futile to do so (Pet. App. 93a). Of the 5 blacks among the candidates selected for the 46 positions filled between July 1976 and October 1981, 3 were selected for vacancies for which only blacks were in competition, and the sole white applicant with which the other 2 competed was a female; no black has ever been selected in competition with a white male applicant (J.A. 114-124; C.A. App. 1003, 1006; GX 172, at 94-95; see C.A. Br. Table 7, at 10a-11a).

c. The district court rejected all claims of the private plaintiffs and the United States. With respect to the salaries of county-level employees, the court held that no pattern or practice of racially discriminatory treatment had been shown (Pet. App. 150a). The court noted that "[i]t is undisputed" that before the merger of its black and white branches in 1965, the Service paid black agents less than white ones, and recognized that, although "steps were taken to begin [the] elimination" of this disparity before the Service was covered by Title VII in 1972, "the government has offered evidence tending to show that as of January 1973, the salaries of numerous black agents throughout the system were less than those of white agents in the same counties who were in comparable or lower positions and who had comparable or less tenure * * * [and] defendants' own exhibit [showed] some salary disparities between blacks and whites as late as October, 1974" (Pet. App. 120a-121a). The district court nevertheless found that "while on its face [the] evidence unquestionably establishes salary disparities, when viewed in the light of defendants' explanatory evidence it fails to prove discrimination" (Pet. App. 122a-123a).[9] Focusing on certain regressions that controlled only for tenure and education (Pet. App. 131a), rather than on those also including job title and job performance as independent variables, the court described the regression analyses as

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[9] Before analyzing the statistical data, the court explained its approach to the requirements of the Civil Rights Act of 1964 (Pet. App. 121a-122a):

> Just as it had been found in the area of education that there is no such thing as instant integration, it was soon found in the field of business and industry that there is no such thing as instant [e]quality in employment. Without risking serious disruption of a business by prohi[b]itively costly budgetary alterations and a possible practice of wholesale reverse discrimination it was soon recognized (though not always by the courts) that the adjustments mandated by the law simply could not be made overnight.

Thus, the "explanatory evidence" the court viewed as justifying the salary disparities established by the government apparently included the historical fact of discrimination.

flawed, primarily because the raw data on which they were based included the salaries of higher-paid county chairmen, most of whom were white, as well as county agents (Pet. App. 136a-138a), and because they failed to account for "several unmeasured factors, notably job performance" (Pet. App. 141a).[10] In sum, the court "conclude[d] that the plaintiffs had probably made out a prima facie case with respect to defendants' promotion and salary practices * * * [but] the defendant * * * articulat[ed] plausible reasons for its actions * * * which the court found convincing" (Pet. App. 190a).

As to the claim that the Service permitted segregated 4-H clubs and extension homemaker clubs to be maintained in North Carolina, recognizing and providing services to such clubs, the district court found that "there are many clubs to which members of both races belong" (Pet. App. 165a), and that "[i]f any individual has become a member of a club composed only of members of his or her own race, it has been an entirely voluntary act" (Pet. App. 172a). The court found no evidence of any denial of membership or discrimination in services on the basis of

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[10] The court relied on a list of variables provided by defendants (Pet. App. 133a-134a):

(1) Performance of agents measured against the agents' plan of work;

(2) The variation in salaries created by across the board state raises with the different percentage of state contributions in each county;

(3) The across the board increases in agent salaries by some counties and not in others;

(4) The merit raises provided by the state;

(5) The merit raises provided for by the counties in which Extension Service personnel have no input;

(6) The merit raises provided by the counties with limited or full participation in the merit recommendation by Extension Service personnel;

(7) The range in merit salary increases provided by the counties (0 [to] 12% in 1981);

(8) Prior and relevant experience; and

(9) Variations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience.

race, and concluded that the law does not require that these clubs be integrated (Pet. App. 165a-185a). The court ruled that the evidence did not demonstrate any discriminatory intent on the Service's part in tolerating the single-race clubs (Pet. App. 179a-182a), and that the Service accordingly did not violate the law in continuing to provide services to such clubs (Pet. App. 184a-185a).[11]

3. a. The court of appeals affirmed (Pet. App. 346a-425a), Judge Phillips dissenting in part (Pet. App. 425a-481a). The panel majority adopted the district court's findings that under policies in effect when the Service maintained two separate racially segregated branches, black employees were paid less than white employees performing the same job because of their race, and that even after the Service became subject to Title VII in 1972, "[s]ome pre-existing salary disparities continued to linger on" (Pet. App. 360a). However, the court stated succinctly (Pet. App. 380a):

> The plaintiffs claim that the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not. We do not think this is the law.

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[11] The district court also held that the plaintiffs failed to establish a prima facie case of racial discrimination in the selection of county chairmen, and that "in any event the defendants have effectively rebutted plaintiffs' case by showing the inaccuracy and insignificance of plaintiffs' proof" (Pet. App. 100a). The court found that only 77 county chairman positions had been filled since the institution of statewide vacancy announcements in 1972, the year Title VII was made applicable to public employers, and that blacks had applied for only 18 of those positions (Pet. App. 78a, 85a-86a). Considering those 18 positions (and thus including positions for which only blacks applied but excluding positions for which only whites applied) the court found the selection rate for blacks acceptable (Pet. App. 79a-80a, 86a), and held that the Service's selection procedures for county chairman have, since 1972, been applied in a nondiscriminatory manner (Pet. App. 100a-101a). The court rejected plaintiffs' claim that blacks had been deterred from applying for chairmanships (Pet. App. 99a), and also rejected all individual claims of discrimination in promotions to county chairman (Pet. App. 227a-317a).

The panel majority relied for its view on *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), as well as several court of appeals decisions that followed *Evans* in rejecting time-barred claims despite the continuing effects of the alleged discriminatory acts on seniority rights (Pet. App. 380a-382a). This view of Title VII's requirement led the panel to fault all of the regression analyses of the salaries of current county employees —recent hires as well as pre-Act hires—because the figures analyzed "reflect the effect of pre-Act discrimination" (Pet. App. 389a). For this reason, as well as because "both experts omitted from their respective analys[e]s variables which ought to be reasonably viewed as determinants of salary," the analyses were deemed "unacceptable as evidence of discrimination" (Pet. App. 391a).

With respect to the selection of county chairmen, plaintiffs challenged on appeal the district court's analysis of selection rates, arguing that the court erred in excluding vacancies for which only whites applied, while including vacancies for which only blacks applied (Pet. App. 411a-412a). The court of appeals majority found it unnecessary to consider these objections, because it concluded that "the employment decisions made by the Extension Service with respect to the selection of County Chairmen were made when the Service either recommended or did not recommend an applicant for an existing vacancy to the County Commissioners" (Pet. App. 405a-406a). It therefore examined the data as to the Service's recommendations, rather than the selection statistics relied on by plaintiffs and the district court, and found no discrimination (Pet. App. 418a-423a).[12]

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[12] The court's initial analysis (Pet. App. 413a-414a), includes all positions for which black candidates applied, whether or not white candidates also competed, but excludes positions for which only white candidates applied. The court's more extended analysis (*id.* at 418a-421a) includes "applicant flow data" for all positions filled during the years 1968-1981. In the latter analysis, the court's references to "applicants" or "applications" during the period 1968-

Finally, the panel majority held that the district court "correctly denied the plaintiffs' claim with respect to the alleged affirmative duty to require integrated membership" in 4-H clubs and extension homemaker clubs because, absent any proof of discrimination, "the mere existence of all white and all black * * * [c]lubs in some racially mixed communities" does not violate the law (Pet. App. 424a n.128).

b. Judge Phillips dissented from the majority's dismissal of the salary claims (Pet. App. 425a, 433a-469a),[13] noting that it was undisputed that prior to the 1965 merger "the salaries of black professionals were intentionally and quite openly simply set lower than those of white colleagues in the same employment positions" (Pet. App. 437a), and that these salary differentials continued "well past 1968 (the earliest limitation date applicable to the salary claim)" (Pet. App. 438a-439a).[14] The regression analyses of both plaintiffs' and defendants' experts were, moreover, in his view, "wholly consistent" in showing a substantial, across-the-board race-based disparity (Pet. App. 449a-450a). Because these analyses "employ[ed] the most obvious alternative variables of tenure, education, and job position" (Pet. App. 449a), Judge Phillips found no authority for rejecting such analyses "for failure to include a number of other independent variables merely hypothesized by defendants" (Pet. App. 448a).

1971, when there were no vacancy announcement and application procedures, evidently refers to the list of possible candidates prepared by Service officials, from which they later made recommendations to the counties (see note 4, *supra*); the court's references to white or black "approvals" refers to the recommendations made by the Service to the counties (see chart preceding Pet. App. 420a).

[13] He also dissented from the majority's rejection of the 4-H and extension homemaker club claims (Pet. App. 425a, 469a-481a).

[14] As Judge Phillips recognized the complaint, filed in November 1971, included claims based on the Constitution and Title VI; the latter has been applicable to the states since 1964. A three-year limitation period applies to those claims. *Cox* v. *Stanton*, 529 F.2d 47, 49-50 (4th Cir. 1975).

In sum, Judge Phillips concluded that "the only rational assessment to be made of the evidence in this record" is that "the general pattern of pre-1965 overt discrimination in salary continued in substantial, if gradually diminishing, degree until at least 1976 and perhaps beyond," and that responsible Service officials knew that such a race-based pattern continued and failed to correct it (Pet. App. 455a-456a). In his view, the majority's failure to award relief on such a record resulted from "misapprehensions of controlling legal principle" (Pet. App. 456a), including the "relevant time frame within which the existence of a pattern or practice of salary discrimination was to be assessed" (Pet. App. 457a).[15]

4. Rehearing en banc was denied by an equally divided court, without opinion, on April 15, 1985, and the panel, Judge Phillips again dissenting, also declined to rehear the case (Pet. App. 482a-483a).

SUMMARY OF ARGUMENT

Hiring and promotion decisions are discrete acts, which, if taken before the effective date of Title VII or outside of the applicable statute of limitations, cannot be the subject of a successful Title VII suit, even if the consequences of those actions continue to affect the employee until the time of suit. But Title VII does require the correction of unequal salaries that are the continuation of racially-based pay differentials originating pre-Act or in the time-barred period. This continuing salary discrimination is akin to intentionally discriminatory seniority systems, which, regardless of the date of their inception, afford no justification for race-based disparate treatment.

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[15] Judge Phillips disagreed with the panel majority's reading of *Evans* and *Hazelwood* as applicable to plaintiffs' salary claims (Pet. App. 462a-467a). Those cases, he explained, do not permit an employer to "continue practices now violative [of Title VII] simply because at one time they were not" (Pet. App. 465a). In his view, the *Evans-Hazelwood* principle "simply has no logical application" in cases involving "pay and other 'condition of employment' claims, as opposed to hiring and other work-force composition claims" (Pet. App. 466a).

With regard to the statistical evidence, the court of appeals articulated the correct rule—that in a disparate treatment case challenging salary differences, plaintiff's statistical analysis must include "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a)—but improperly applied that rule. The parties' multiple regression analyses, together with the other evidence introduced, proved that there was racial discrimination in salaries. None of the variables omitted from petitioners' analyses undermines that conclusion. As a corollary to the "reasonableness" standard for statistical proof, we urge that district courts be encouraged to make formal determinations at the earliest possible stage of the proceedings of the factors to be included in statistical analyses offered at trial.

Although private petitioners ask this Court to consider whether Title VII permits an employer to delegate its hiring decisions to a third party that invariably acts in a discriminatory manner (85-93 Pet. 49-55), this case presents no such issue. It is clear that the Service was jointly responsible with the county commissioners for the selection of county chairmen; even the court of appeals recognized this (Pet. App. 403a). The court's reliance on statistics relating to the recommendations made by respondents, rather than the final selection statistics, was accordingly inappropriate.

Finally, the court of appeals correctly found that respondents had satisfied their affirmative duty to desegregate the 4-H and homemaker extension clubs by maintaining and publicizing a policy of entirely open admissions to such clubs. Although some single-race clubs remain, neither the Constitution nor Title VI requires any particular degree of racial balance, and maintenance of the traditional option of individuals to join any club that they choose does not suggest that respondents are perpetuating their prior segregative practices.

ARGUMENT

I. BLACK STATE EMPLOYEES ESTABLISH A CLAIM UNDER TITLE VII BY IDENTIFYING CURRENT SALARY DISPARITIES BETWEEN THEMSELVES AND WHITE EMPLOYEES HOLDING THE SAME JOBS AND DEMONSTRATING THAT SUCH DISPARITIES RESULT FROM A STATE POLICY BEFORE 1965 OF PAYING BLACKS LOWER SALARIES THAN WHITES.

The court of appeals acknowledged that, before the merger in 1965, the Service maintained two separate racially-segregated branches and paid black employees less than white employees because of their race; that, after the merger, these race-based disparities were not immediately eliminated; and that these disparities continued after this suit was filed and after Title VII became applicable to the Service in March 1972 (Pet. App. 359a-360a, 389a-390a). As a result, since the effective date of the Act, black employees hired before 1965, because of their race, have received and continue to receive lower salaries than white employees who have been performing the same job for the same length of time. The court of appeals incorrectly decided that Title VII provides no remedy to these black employees (Pet. App. 380a-382a, 399a-400a).

The court of appeals relied in large part on this Court's decisions in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), interpreting those decisions as absolving an employer of any responsibility for affirmatively eliminating the continuing effects of pre-Act salary discrimination provided it has adopted a race-neutral policy in establishing salaries for post-Act hires. The appellate court's reliance is misplaced, however, as this Court's decisions in *Evans* and *Hazelwood* are readily distinguishable from the case at bar.

In *Evans*, a female flight attendant forced to resign when she married in 1968, and rehired in 1972 after the "no marriage" policy for female flight attendants was

discontinued, challenged United's refusal to credit her prior service towards her seniority. Noting the absence of any allegation that prior service is credited to rehired male employees under United's seniority system, this Court acknowledged that the denial of pre-1972 seniority "does indeed have a continuing impact on [Evans'] pay and fringe benefits" (431 U.S. at 558), but rejected her claim that United was guilty of a continuing violation of Title VII, stating (*id.* at 558, 560):

> [T]he seniority system gives present effect to a past act of discrimination [the forced resignation]. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the [statutory limitations period]. A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
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> * * * * *
>
> The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.

The Court's decision in *Evans* thus turned on the fact that United's past act of discrimination—forcing Evans to resign because she was a married female—was a single, discrete act taken at a time outside of the applicable statutory limitations period, and as such was not actionable under Title VII. The Court acknowledged, as the court of appeals assumed here, that the *Evans* rule is equally applicable when the discriminatory act was taken before the effective date of Title VII.

To similar effect is the Court's decision in *Hazelwood*. There this Court vacated a court of appeals judgment, based on statistical disparities between the racial composition of Hazelwood's teaching staff and that of the qualified public school teacher population in the relevant labor market, that the school district had engaged in a pattern and practice of hiring discrimination in violation of Title VII. Although this Court agreed that the court of appeals correctly rejected the district court's statistical analysis, it held that the statistical disparities on which the appellate court relied were not dispositive (433 U.S. at 309-310 (footnote omitted)):

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes. For this reason, the Court cautioned in the *Teamsters* opinion [*International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977)] that once a prima facie case has been established by statistical workforce disparities, the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." 431 U.S., at 360.

Thus, *Hazelwood* indicates that Title VII is not violated by disparities in the racial composition of an employer's staff which are the present effects of discriminatory hiring decisions, all of which occurred before the effective date of Title VII.

Evans and *Hazelwood* thus establish that pre-Act or time-barred hiring and termination decisions cannot form the basis of a claim under Title VII, even when those decisions have continuing current effects due, for example,

to the operation of a bona fide seniority system.[16] Similarly, pre-Act or time-barred promotion decisions cannot be challenged under Title VII on the theory that the claimant who should have received the promotion now continues in a lesser job at a salary level below that which he would have obtained had he not been the victim of the pre-Act or time-barred discrimination.[17] Hiring and promotion decisions are discrete acts, taken once and for all at a single moment in time. *Evans* and *Hazelwood* teach that if that moment occurred prior to the effective

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[16] Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), validates only "bona fide" seniority systems. If an employee can show that the seniority system was adopted with a discriminatory intent, Section 703(h) affords the employer no protection. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276-277 (1982). This Court has emphasized that Section 703(h) "makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76 (1982).

[17] There appears to be a conflict among the circuits as to whether an employee can avoid a statute of limitations defense by establishing he was denied promotion pursuant to a continuing practice of discriminatory promotion denials, or whether he must file within the statutory period after he is himself denied promotion even where such a practice is alleged. Compare, *e.g.*, *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978) (continuously maintained promotion policy may be subject of complaint until statutory time "after the *last occurrence* of an instance of that policy," citing cases), and *Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 304 (4th Cir. 1978) (*Evans* is inapplicable where a discriminatory promotion system is maintained; the discrimination continues from day to day and a specific violation occurs whenever a promotion is made), with, *e.g.*, *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974, 977-978 (5th Cir. 1980) (suit must be filed within statutory time after employee should have perceived discrimination was occurring). However, we are unaware of any case in which a court has permitted an employee to rely on the current effect of a discriminatory promotion policy that was terminated in a time-barred period. Such a complaint, we submit, would clearly be untenable under *Evans*. Moreover, we have serious doubts about the validity of any theory that would permit an employee who does not sue in a representative capacity to recover when the denial of promotion that affected him is wholly pre-Act or time-barred, even if the discriminatory policy continues so as to affect other employees.

date of the Act or beyond the reach of the statute of limitations, the discriminatory decision cannot be the subject of a Title VII suit, even though the consequences of that decision may well continue to the present. Indeed, it could scarcely be otherwise unless the Act is, as a practical matter, to have retroactive application, and relief for past illegalities is to be available into the indefinite future. For better or worse, unlawful discriminatory hiring, promotion and termination decisions must either be timely complained of or be taken to have fixed a person's situation once and for all—unless, of course, fresh illegalities are subsequently committed.

No such practical and conceptual difficulties attend the correction of unequal salaries that are the continuation of pre-Act, admittedly racially-based pay differentials. One claim in the case at bar is that the Service has continued to pay certain black employees less than white employees holding the same job for the same length of time, simply because of their race. Until now, the courts of appeals—including the Fourth Circuit—have consistently held that such discrimination in compensation is a continuing violation of Title VII, and as such is actionable, notwithstanding *Evans* and *Hazelwood*, even when the pay differentials originated before the effective date of the Act or outside of the statutory limitations period. Thus, for example, the Fourth Circuit stated in *Jenkins* v. *Home Insurance Co.*, 635 F.2d 310, 312 (1980) (per curiam):

> Unlike *Evans*, the Company's alleged discriminatory violation occurred in a series of separate but related acts throughout the course of Jenkins' employment. Every two weeks, Jenkins was paid for the prior working period * * * an amount less than was paid her male counterparts for the same work covering the same period. Thus, the Company's alleged discrimination was manifested in a continuing violation which ceased only at the end of Jenkins' employment.

Accord, *Kim* v. *Coppin State College*, 662 F.2d 1055, 1061 (4th Cir. 1981) ("This court * * * has consistently dis-

tinguished *Evans* when the discriminatory employment practice has continuously affected the complaining employee and is continuing."); *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir. 1982) ("[T]he discrimination was continuing in nature. Hall suffered a denial of equal pay with each check she received."); *Satz* v. *ITT Financial Corp.*, 619 F.2d 738, 743 (8th Cir. 1980) ("The practice of paying discriminatorily unequal pay occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues."); *Bartelt* v. *Berlitz School of Languages of America, Inc.*, 698 F.2d 1003, 1004 (9th Cir.), cert. denied, 464 U.S. 915 (1983) ("The policy of paying lower wages to female employees on each payday constitutes a 'continuing violation.'"). Cf. *Perez* v. *Laredo Junior College*, 706 F.2d 731 (5th Cir. 1983) (applying Title VII principles in suit under Sections 1981 and 1983).

Viewing discrimination in compensation as a continuing violation of Title VII, the courts of appeals after *Evans* have held that pre-Act, intentional discrimination cannot be used to justify the post-Act payment of lower salaries to minority employees than to other similarly situated employees. In *Lamphere* v. *Brown University*, 685 F.2d 743, 747 (1st Cir. 1982), for example, the First Circuit ruled that a female faculty member's "allegations that she received a discriminatorily low wage after 1972 [when Title VII became applicable to educational institutions] as a result of pre-1972 discrimination" were actionable, stating: "[A] decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights." Cf. *Berry* v. *Board of Supervisors of Louisiana State University*, 715 F.2d 971, 980 (5th Cir. 1983).

These court of appeals decisions reflect the proper construction of Title VII, and correctly distinguish challenges to salary discrimination originating before the Act or outside of the limitations period, but continuing after the effective date of the Act, from cases such as *Evans* and *Hazelwood* involving challenges to the post-Act effects of

discrete pre-Act decisions such as hiring and termination. The continuing salary discrimination involved here is akin to the continued use of an intentionally discriminatory seniority system, which this Court has held is unlawful under Title VII even if the seniority system was adopted before the Act became effective. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 276-277 (1982); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 76 (1982).[18] Just as an intentionally discriminatory pre-Act seniority system affords no justification for current employment practices that have a race-based effect, so too an intentionally discriminatory pre-Act salary system affords no justification for current salary practices that have a race-based effect. To the extent that the court of appeals' justification of post-Act salary disparities as merely the "lingering effect" of pre-Act overt discrimination (Pet. App. 399a) represents a willingness to tolerate such practices, its decision cannot be allowed to stand.[19]

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[18] See note 16, *supra*. This Court addressed the question of continuing pre-Act salary disparities in the context of a suit under the Equal Pay Act, 29 U.S.C. 206; *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). That decision is not strictly in point here, however, as a violation of the Equal Pay Act is established simply by showing the payment of lower wages to women than to men performing the same work; the date when the disparity originated, and the reasons underlying the disparity, are largely irrelevant. In contrast, the plaintiff in a discriminatory treatment case under Title VII must establish not only the disparity in wages, but also the employer's intent to discriminate. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 335 n.15. Thus, a current disparity in salaries, without more, cannot be the basis for this Title VII claim of discriminatory treatment. Instead, it is necessary to examine the basis for that disparity to determine whether there has been actionable intentional discrimination subject to a timely challenge. Here, although the Service's decision to pay black employees less than whites for the same work was taken before Title VII became applicable to public employers, there is no dispute that the Service's compensation scheme remained intentionally discriminatory. See pages 7, 9, *supra*; Pet. App. 439a-440a; J.A. 129-130.

[19] Further fact finding will be necessary to establish the recovery due any individual employee. As both courts below emphasized, the

II. THE REGRESSION ANALYSES SHOWED RACIAL DISCRIMINATION, AND RESPONDENTS DID NOT REFUTE THAT SHOWING

The court of appeals clearly would have erred if it had held, as private petitioners assert in their Questions Presented, "that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable" (85-93 Pet. i). However, the court below did not impose this onerous "every conceivable variable" burden on petitioners in this case. Rather the appellate court articulated the correct rule, that a plaintiff's statistical analyses in a disparate treatment case must include "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a). We nevertheless agree with private petitioners that the result reached by the court below cannot be sustained because of a variety of errors of fact and law.

It should be noted at the outset that reversal of the court below on the first Question Presented automatically requires reversal of the court of appeals' analysis of the statistical proof. One of the bases for the court's rejection of petitioners' regression analysis in this case was that "the analysis contained salary figures which reflect the effect of pre-Act discrimination" (Pet. App. 389a). Because the result we urge on the first Question Presented affirms the correctness of considering the effects of the pre-Act salary discrimination in this case, the holding of the court below cannot stand. At a minimum, the case should be remanded for consideration of whether, when the effect of the pre-Act discrimination on salary

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effects of the original discriminatory salary practices are part of a complex matrix of pre- and post-Act salary decisions, including merit raises, cost of living increases, and county-to-county variations in salary increases (Pet. App. 109a-116a, 360a-362a). The extent to which these decisions carry forward the effects of the original discriminatory practices, and the extent to which any such decision is actionable in this suit by any employee, must be resolved first by the district court.

is considered, the petitioners' statistics demonstrate disparate treatment in fixing salaries.

But other factual and legal errors in the court of appeals' analysis of the statistical proof in this case require entry of judgment for the petitioners on the issue of salary discrimination. Before discussing these errors, however, we outline the general standards for analyzing the legal sufficiency of a plaintiff's regression analysis in a disparate treatment pay disparity case.[20]

A. In Order To Establish A Prima Facie Case Of Salary Discrimination, A Regression Analysis Must Control For Factors That Normally Affect Salary

Because this is a disparate treatment case, "[p]roof of discriminatory motive is critical" to a claim of class-wide discrimination in fixing salaries. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. But a plaintiff is not required to prove discriminatory motive directly. A plaintiff establishes a prima facie case of intentional racial discrimination under Title VII if he "eliminates the most common nondiscriminatory reasons" for the challenged act. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). The reasoning underlying this standard was explained in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (emphasis in original):

> [W]e are willing to presume [intentional discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an application have been eliminated as possible reasons for the employer's actions, it is more likely than not the em-

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[20] Our discussion focuses on the use of one type of statistical evidence: multiple regression analyses. A party may offer other types of statistics, such as cohort studies and multiple pool tests, either instead of or in addition to regression analyses. We do not suggest that regression analyses are the only, or even the best, statistical tools for use in disparate treatment cases.

ployer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

When plaintiffs present their proof in the form of statistical analyses, these basic principles should not change. Statistical methods should continue to reflect the premises that in a disparate treatment case plaintiff claims to be the victim of intentional discrimination, and that plaintiff bears the burden of proving that intention. Statistics are just a way of proving intention by indirect, inferential means. The touchstone of whether plaintiff has made out a prima facie case (that is, whether plaintiff has made a showing sufficient to permit the case to be presented to the trier of fact) is whether his statistical analysis eliminates the "most common nondiscriminatory reasons" for the disparate treatment, thus leaving racial discrimination as the logical inference. In order to apply these principles to statistical proof in a disparate treatment case, however, it is essential to understand the probative value of the statistics. "As this Court admonished in *Teamsters*: '[S]tatistics . . . come in infinite variety . . . . [T]heir usefulness depends on all of the surrounding facts and circumstances.' 431 U.S., at 340." *Hazelwood School District* v. *United States*, 433 U.S. at 312.

In this case the primary statistical proof offered by the United States on behalf of the plaintiffs consisted of multiple regression analyses. The purpose of a multiple regression analysis in this setting is to determine whether the factor of race has sufficient correlation to salary differentials to satisfy plaintiff's burden of proving intentional discrimination. In the language of statistics, salary is referred to as the "dependent variable" in the calculation. To make the calculation "one first specifies the major variables [referred to as 'independent variables'] that are believed to influence the dependent variable." Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705 (1980). "The relationship between the dependent variable [here, salary] and the

independent variable of interest [here, race] is then estimated by extracting the effects of the other major variables" (*id.* at 706). "The results of multiple regressions can be read as showing the effects of each variable on the dependent variable, holding the others constant. Moreover, those results allow one to make statements about the probability that the effect described has merely been observed as a result of chance fluctuation" (*ibid.*).

Thus in order to show that race is likely to have influenced salary, a multiple regression analysis must control for other major variables that are thought to influence salary. A multiple regression analysis that is so structured can meet the plaintiff's burden of proving a prima facie case of disparate treatment because the statistical proof eliminates the "most common nondiscriminatory reasons" for the disparate treatment.[21]

Conversely, if the plaintiff's multiple regression analysis does not account statistically for the "most common nondiscriminatory reasons" for differences in salary, the statistics cannot be said to give rise to an inference of racial discrimination and therefore do not make out a prima facie case. This principle was recognized in the context of hiring discrimination in *Hazelwood School District* v. *United States*, 433 U.S. at 308. The Court held in that case that in order to show racial discrimination in hiring school teachers the "proper [statistical] comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the *qualified* public school teacher population in the relevant labor market" (*ibid.*; emphasis added). The Court went on to explain that the statistical analysis must account

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[21] In addition, of course, the multiple regression analysis must have statistical reliability. "[A] regression not only estimates the effects of the variables involved in the model but also measures the certainty or accuracy of such estimates. In addition, it provides overall measures of how well the model fits the data as a whole." Fisher, *supra*, 80 Colum. L. Rev. at 716. The statistical significance of the petitioners' regression analyses was not questioned by the courts below and is not an issue in this case.

for hiring qualifications in order to have probative value (*id.* at 308 n.13):

> In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

It follows from the *Hazelwood* Court's analysis, and a number of cases have so held,[22] that in a disparate treatment case if a plaintiff's statistics fail to account for the "most common nondiscriminatory reasons" for the employer's behavior (*Burdine*, 450 U.S. at 254) (that is, if they do not account for "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a), the defendant may prevail merely by pointing out that plaintiff's proof is not sufficient to give rise to an inference of discrimination. In those circumstances it should not be necessary for the employer to offer his own statistics in rebuttal.[23]

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[22] See, *e.g.*, *Valentino* v. *U.S. Postal Service*, 674 F.2d 56, 70-71 (D.C. Cir. 1982); *Eastland* v. *Tennessee Valley Authority*, 704 F.2d 613, 624-625 (11th Cir. 1983); *Wilkins* v. *University of Houston*, 654 F.2d 388, 401-405 (5th Cir. 1981); cf. *St. Marie* v. *Eastern R.R. Ass'n*, 650 F.2d 395, 400 (2d Cir. 1981).

[23] Some cases have indicated that an employer cannot challenge a plaintiff's statistical evidence without making a showing that the factor the employer claims should have been included in the plaintiff's analysis would in fact have eliminated the racial effect. *Segar* v. *Smith*, 738 F.2d 1249, 1267-1270 (D.C. Cir. 1984), cert. denied, No. 84-1200 (May 20, 1985); *Trout* v. *Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983), rev'd on other grounds, 465 U.S. 1056 (1984); cf. *Griffin* v. *Carlin*, 755 F.2d 1516, 1526-1528 (11th Cir. 1985). These cases rely on *Teamsters*, 431 U.S. at 360-362, for the relevant pattern of proof in class disparate treatment cases. But the pattern of proof in *Teamsters* does not differ significantly from that stated

This is not to say that the plaintiff as part of his prima facie case must present a perfect statistical analysis which takes into account every conceivably relevant variable. *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 (1977). Indeed, statistical theory presumes that even after the multiple regression analysis accounts for all the major factors thought to influence the dependent variable, other factors remain unaccounted for, and these factors may have a significant influence on the dependent variable. Fisher, *supra*, 80 Colum. L. Rev. at 705-706. If the plaintiff's statistics include the major non-discriminatory factors thought to influence salary, and if they show a statistically significant effect for race as a dependent variable, the plaintiff has made the required prima facie showing of disparate treatment. If at that point the defendant asserts that some additional factor should have been accounted for in the regression, the defendant must show that inclusion of the factor would have explained the salary disparity (that is, that inclusion of the factor would have eliminated the statistically significant effect for race). Requiring the defendant to offer statistical (or other) proof at this stage is consistent with the requirements of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). To dispel the adverse inference from a prima facie showing the employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Ibid.* Accord *Furnco*, 438 U.S. at 578.

As stated above, we believe that the court of appeals in this case articulated the correct standard, requiring the plaintiff's statistics in a disparate treatment case to include "variables which ought to be reasonably viewed as determinants of salary" (Pet. App. 391a). This rule of reason, like all general evidentiary standards, par-

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in *Burdine*. Indeed *Teamsters* explicitly acknowledges that the employer may attack the plaintiff's case by showing that plaintiff's proof is "inaccurate or insignificant" as well as by "provid[ing] a nondiscriminatory explanation for the apparently discriminatory result" (431 U.S. at 360-361 & n.46).

ticularly those relating to statistical proof, will necessarily vary in application from case to case. See *Hazelwood*, 433 U.S. at 312; *Teamsters*, 431 U.S. at 340. In many situations, common sense will yield obvious answers. In this case, for example, it was reasonable to expect that the length of time the employer worked for the defendant (job tenure) would affect the employee's salary, because some of the pay raises the employer gave were across-the-board percentage increases. Therefore the statistics offered by the United States on behalf of the plaintiffs in this case did include job tenure as a variable in the multiple regression analysis.

In general the "variables which ought to be reasonably viewed as determinants of salary" should reflect the factors that go into the employer's own salary decisions In a disparate treatment case it is assumed that an employer is not required to make hiring, promotion or salary decisions on a basis common to most employers, or on any given basis. Title VII requires only that the basis of decision be nondiscriminatory. *Burdine*, 450 U.S. at 258-259; *St. Marie* v. *Eastern R.R. Ass'n*, 650 F.2d 395, 399 (2d Cir. 1981). Thus, for example, if the defendant chooses to give raises on the basis of job attendance, the plaintiffs' regression analysis should include job attendance as a variable.[24]

In disparate treatment cases where the parties dispute whether a particular factor or variable "ought to be reasonably viewed as [a] determinant[] of salary" (Pet. App. 391a), if that dispute is not resolved before trial, one party or the other may be seriously disadvantaged by the trial court's ruling on that issue. If plaintiff's regression does not account for the variable and the district court rules that its inclusion was required as part of plaintiff's prima facie case, plaintiff will lose unless

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[24] In this hypothetical, if the plaintiff was alleging that job attendance records had been kept in a discriminatory fashion, plaintiff's regression analysis need not include this "tainted" variable, *so long as* plaintiff offered some proof that attendance records were tainted by racial discrimination. See note 34, *infra*.

he has prepared back-up statistics. Conversely, if the district court rules that the variable was *not* required to be included, a defendant who had been relying on the inadequacy of plaintiff's case will lose if he had not prepared counter-statistics. But these harsh results are not inevitable. A preliminary judicial determination of the nondiscriminatory factors that are to be subjected to analysis will greatly aid in eliminating evidentiary and burden of proof problems because it will focus the court's and the parties' efforts on the same data from the outset. This approach will preclude wasted efforts (an important consideration because of the exceptional time and expense involved in preparing multiple regression analyses) and post hoc reallocation of burdens. We therefore urge, as a corrollary to the "reasonableness" standard we have outlined, that district courts be encouraged to make formal determinations at the earliest possible stage of proceedings as to the required (for the plaintiff) and permissible (for the defendant) data to be included in multiple regression analysis offered at trial. See Finkelstein, *Regression Models in Administrative Proceedings*, 86 Harv. L. Rev. 1442 (1973).

B. The Court Of Appeals Erred In Analyzing The Statistical Proof Offered In This Case

The allocation of proof outlined in the preceding section does not place excessive burdens on plaintiffs in disparate treatment cases. Indeed, application of these standards to the facts of this case compels the conclusion that the multiple regression analyses employed on behalf of petitioners, in conjunction with the other evidence introduced, proved racial discrimination in salaries.[25] Although the nondiscriminatory variables on which the courts below focused are generally ones that should be

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[25] We submit that petitioners established a prima facie case; that the Service did not successfully produce probative rebutting evidence; and that the petitioners therefore sustained their burden of persuasion. In accordance with *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983), we now focus on the evidence as a whole.

considered in an analysis of salary, the courts erred in their examination of these factors in the particular circumstances of this case.

The United States' expert prepared multiple regression analyses concerning salaries for the years 1974, 1975 and 1981. Certain of these regressions used four independent variables—race, education, tenure, and job title. This model reflected the deposition testimony of a Service official who stated that the most important factors in determining salaries were tenure, job title, education degree and job performance (see page 5, *supra*); the model omitted only the factor of job performance, which was accounted for by other evidence in the case.[26] The regressions showed that in 1974 the average black employee earned $331 less than a white employee with the same job title, education and tenure (C.A. App. 1601, 402-403), and that in 1975 the disparity was $395 (C.A. App. 1589, 416).[27] Both of these racial disparities were statistically significant (C.A. App. 402-403, 416).[28]

The Service introduced multiple regression analyses prepared by its expert for the years 1975 and 1981. Using the *same model* that the petitioners had used, respondents' expert obtained substantially the same result for 1975, a statistically significant racial effect of $384

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[26] See pages 32-33, *infra*.

[27] Contrary to the district court's suggestion (Pet. App. 136a-139a), the inclusion of county chairmen in the data base did not distort the results of these regressions. Job title was included as a variable in the critical regressions, and therefore the salaries of county chairmen were only compared with those of other county chairmen—and the salary claims related only to the salaries of agents.

[28] The regressions for 1981 showed a smaller disparity which lacked statistical significance (C.A. App. 1578). The lack of a significant racial disparity in 1981 affects, at most, the *relief* to which plaintiffs are entitled; it does not affect the Service's *liability* for the post-Act violation of Title VII established by the 1974 and 1975 regressions, whether or not the pattern and practice of salary discrimination demonstrated for those years continued at the time of trial in 1981.

(C.A. App. 1716 (analysis 5), 1711-1712). Respondents also introduced regressions adding quartile rank as an independent variable. Doing so for 1975 actually *increased* the amount of the racial effect to $475—again a statistically significant result (C.A. App. 1716 (analysis 6), 1713-1714).

Thus, the statistical evidence offered by respondents actually bolstered petitioners' case rather than rebutting it. Taken together, the regressions accounted for all of the elements respondents themselves identified during discovery as the most important determinants of salary: job level, tenure, education and quartile rank.

Nevertheless, respondents criticized petitioners' statistical case as inadequate, listing additional variables which they hypothesized might, if included, have an effect on the racial disparities demonstrated by the regressions. As we demonstrate below, however, none of the "omitted variables" provides an appropriate basis for determining that petitioners had not met their burden of proof.

1. The only variables specifically discussed by the panel majority are those relating to differences among counties as to salaries (Pet. App. 387a-390a).[29] It is undisputed in this case that salary levels varied among the various counties and thus the court of appeals is correct that such a major salary-affecting variable should have been accounted for as part of petitioners' case in chief.[30] The court erred, however, because it failed to

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[29] The majority stated (Pet. App. 390a):

> The across-the-board and percentage pay increases granted by a county, as well as counties which simply pay higher salaries, also are bound to flaw the regression analyses since they were not taken account of. It is also apparent that percentage pay raises from whatever source will magnify any existing disparity.

This discussion relates to items (2), (3) and (7) on the defendants' list of omitted variables (see note 10, *supra*), and may also relate to items (4) and (6).

[30] Although it is not necessary to reach the issue in order to decide this case, it is arguable that petitioners should be excused

recognize that the county-by-county disparities *were* accounted for by petitioners' evidence, albeit not in the multiple regression analyses.

The United States introduced unrebutted evidence that removed county differences as a possible explanation for the racial disparities in salaries shown by the regression analyses. This evidence included: (1) an exhibit establishing that black employees were not located disproportionately in the low-contributing counties (C.A. App. 189, 1611-1623); and (2) intra-county comparisons showing dozens of examples of black agents who were paid less than their white counterparts (C.A. App. 1563-1567 (exhibit based on 1973 data), 189-190 (proposed findings)). In addition, the same pattern—whites earning more than blacks in the same county who had the same or superior job title, tenure and education level—was shown in exhibits introduced by respondents (C.A. App. 1626-1680; DX 67).

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from including this variable in their regression analyses because until the brink of trial the Service did not identify inter-county salary variance as a major factor influencing salary. The multiple regression analyses introduced at trial included variables the Service identified during discovery as the primary factors affecting salary (see page 5, *supra*). Respondents criticized the omission of other variables from these regressions, variables that they had listed for the first time a few days before trial in response to our motion for summary judgment on the salary issue (Def. Response filed Nov. 27, 1981). The court stated that the regressions sufficed to establish a prima facie case of salary discrimination, and indicated that petitioners would prevail unless the Service established that the introduction of other variables into the analyses would eliminate or reduce the disparities shown (see note 6, *supra*). Trial proceeded on that basis, and the Service failed to meet its burden. Nevertheless, the district court entered judgment for the Service on the salary claim, stating that the plaintiffs "had probably made out a prima facie case," but that the Service had rebutted that case by meeting its "burden of articulating plausible reasons for its actions * * * which the court found convincing" (Pet. App. 190a). This post hoc reallocation of the burdens of proof raises serious questions of procedural fairness in this case. Cf. *Keyes* v. *School District No. 1*, 413 U.S. 189, 209 (1973).

The court of appeals majority completely failed to acknowledge this evidence. Yet, as Judge Phillips pointed out in his dissent, such evidence "completely undercuts [respondents'] suggestion * * * that the regression analyses were flawed because of different salary levels from county to county" (Pet. App. 455a n.137; see also Pet. App. 454a & n.136). Accordingly, the evidence shows clearly that the majority erred in using the issue of salary differences among counties as a ground for discounting the results of the regression analyses because overall salary differences among counties did not explain the lower salaries of black agents.

2. The district court stressed job performance as the most important factor determining post-entry salaries (Pet. App. 134a, 141a). According to the district court, "neither side" incorporated job performance in its regression analyses (Pet. App. 134a). This was a primary reason the district court refused to credit the regression data (Pet. App. 141a).

The district court clearly erred in this ruling, and the court of appeals improperly sustained that error. As stated above, regression analyses prepared by respondents' own expert included the quartile rank measure of job performance.[31] Inclusion of the quartile measurement re-

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[31] The Service's method of evaluating job performance is its quartile system under which, each year, the respective district chairmen place each agent in one of four quartiles (C.A. App. 283-284). Quartile rank is used as the basis for awarding merit raises, with agents in quartile I receiving the highest salary increases (C.A. App. 1382-1387). There are no numerical ratings or rankings within a quartile (Pet. App. 113a-114a), so the only feasible measure of job performance is quartile itself.

The validity of the quartile system under Title VII, although not raised in the petitions for certiorari, was a separate issue in the courts below. The court of appeals held that quartile ranks were assigned in a nondiscriminatory manner (Pet. App. 391a-397a). According to the court of appeals majority, this finding meant that there was no discrimination in awarding merit salary increases. In reaching that conclusion, the majority did not mention the Service's 1975 regression which included quartile rank and thereby increased the race effect. Moreover, as Judge Phillips pointed out in his

sulted in an *increased* racial effect for 1975,[32] thus supporting the claim of salary discrimination.[33] Of course, it does not matter that this proof came into the case as part of the respondents' evidence. After a full trial on the merits a reviewing court looks to the evidence as a whole. *United States* v. *Aikens, supra.*[34]

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dissent (Pet. App. 452a n.135), even if the quartile system itself was valid, it by no means follows automatically that the process for determining salaries (including merit increases) was nondiscriminatory.

[32] However, inclusion of quartile rank significantly *decreased* the disparity for 1981 ($310 to $142) (C.A. App. 1713-1714, 1716). As was true of the United States' regressions for 1981, the Service's regressions for that year, both with and without quartile rank, showed racial effects that were not statistically significant (C.A. App. 1691-1692, 1700, 1701).

[33] Quartile rank is pertinent to other items on the Service's list of variables that allegedly should have been included in petitioners' regressions: "merit raises provided by the state," and "merit raises provided by the counties with * * * participation * * * by Extension Service personnel" (Pet. App. 133a). Merit increases—whether provided by the state or a county—are, according to respondents, based on quartile rank (Pet. App. 112a-115a (state); *id.* at 110a-112a (county)). Item (5) on the Service's list is "merit raises provided for by the counties in which Extension Service personnel have no input." There is no factual basis for the dsitrict court's finding (Pet. App. 133a) that merit raises have been made in that manner, as the court of apeals seems to have acknowledged (Pet. App. 361a n.3).

[34] Job performance is, of course, normally related to salary and thus should be controlled for in a regression analysis, at least where, as here, the employer considers job performance in making salary determinations. Here, however, the only feasible measure of job performance—quartile rank—was itself alleged to be discriminatory. In our view a plaintiff should not be excused from including an otherwise important factor in his multiple regression analysis by merely *alleging* that the factor is itself discriminatory. A plaintiff must in addition make at least some showing, through statistics or otherwise, that the factor he excludes from his analysis is in fact discriminatory. If a plaintiff is not required to negate the significance of directly relevant, omitted variables, this effectively creates a presumption that the variables that were excluded because they *may* be "tainted" by discrimination are *in fact* being applied in a discriminatory manner. Such a burden of proof simply assumes the

3. The last two items on the Service's list relate to prior experience.[35] Here, the Service had no existing standard and produced no evidence whatsoever relating to the kinds of experience, if any, that are relevant to extension work or affect salary levels (see C.A. App. 928-930; GX 166, at 52-53).[36] As a result, there is no basis for measuring the prior experience of Service employees or for including that factor in a regression.[37]

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conclusion that the defendant has discriminated with respect to factors affecting salary. If a plaintiff is to be excused from including numerous variables that are most directly related to salary because those variables are susceptible to discriminatory manipulation, he must also be required to provide supplementary evidence to support the claim that those variables have been so manipulated.

In this case petitioners *did* seek to prove that the quartile system was applied in a discriminatory manner, by offering evidence separate from the multiple regression analyses. Pet. App. 115a-116a. The correctness of the court of appeals' determination that quartile ranks were assigned in a nondiscriminatory manner is not presented for decision by this Court. And there also is no need to determine whether the showing made was sufficient to excuse petitioners from including quartile rank in their regression analyses because, as stated in the text, the respondents included quartile rank in their regressions.

[35] These items are "[p]rior and relevant experience" (item 8) and "[v]ariations in salary due to market demands both at time of hire and later for agents with skills in short supply or prior experience" (item (9)) (Pet. App. 133a-134a). The latter item is, as the district court recognized (Pet. App. 134a), "difficult if not impossible to measure and quantify."

[36] This case is, in our view, distinguishable from *Segar* v. *Smith*, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, No. 84-1200 (May 20, 1985) on this basis. In *Segar*, which involved the assignment of new employees to different job levels (GS-7 or GS-9), the federal agency had a written standard as to prior experience qualifying an employee for placement at the higher level (see 738 F.2d at 1275). Under those circumstances, as we pointed out in our petition for certiorari in that case, prior experience is one of the factors normally expected to explain salary differentials and therefore should be included in plaintiffs' regression analyses as part of their prima facie case.

[37] The United States placed into evidence Service personnel files including applications which list the employee's pre-hire work his-

In sum, the court of appeals majority erroneously refused to accept the multiple regression analyses (proffered by both petitioners and respondents) as proof of racial discrimination. The regressions, along with the other evidence discussed above, did establish racial discrimination in salaries, and, accordingly, petitioners should have prevailed on this claim.

III. THE SERVICE RETAINS JOINT RESPONSIBILITY FOR THE SELECTION OF COUNTY CHAIRMEN, AND IS THEREFORE LIABLE UNDER TITLE VII FOR DISCRIMINATION IN THOSE SELECTIONS

The private petitioners invite this Court to consider whether Title VII permits an employer to delegate its hiring decisions to a third party which invariably acts in a discriminatory manner (85-93 Pet. 49-55). We submit, however, that this question is not properly presented here. The court of appeals concluded that the Service was not "separately responsible" for the selection of county chairment (Pet. App. 412a). It also noted, however (Pet. App. 403a), that "the agreement of the Extension Service and the County Commissioners is required in order to fill the [county chairman] vacancy." The district court explicitly so found: "all appointments are worked out jointly between the Extension Service and the [county] commissioners and no official action can be taken unilaterally by either party" (Pet. App. 77a). No party challenged this finding on appeal, and it is well supported by the record (see, *e.g.*, J.A. 163; C.A. App. 1690). The only question properly presented in this context is thus whether each participant in a joint employment decision must comply with the dictates of Title VII. It requires no extended analysis to demonstrate the fallacy of permitting each participant to avoid liability solely by showing that it shared the decision with another. *E.g.*, *Farmer* v. *ARA*

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tory (GX 63). Analysis of those applications shows that black agents averaged more years of pre-hire experience than did white agents (C.A. Br. Table 6, at 9a). Many black witnesses described their prior experience, and much of it was directly related to extension work (see, *e.g.*, Tr. 34, 627-629, 807, 924).

Services, Inc., 660 F.2d 1096, 1104 (6th Cir. 1981); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); see *Atonio* v. *Wards Cove Packing Co.*, 768 F.2d 1120, 1125 (9th Cir. 1985); cf. *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273, 284-285 (1976). It was accordingly inappropriate for the court of appeals to focus on the statistics regarding the applicants identified by the Service for consideration for promotion, rather than on the statistics with respect to the final choices that were made.[38] In sum, a remand for reconsideration of the appropriate statistics may be warranted, but this record provides no occasion for consideration of an employer's liability for decisions made without its participation.

If the Court nevertheless reaches the issue urged by the private petitioners, we submit, for the reasons explained in our petition, that *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982), makes clear that an employer cannot properly be held vicariously liable under Title VII.

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[38] See note 12, *supra*. The court did refer briefly to the ultimate success rates of black and white applicants, and determined, "[u]sing the district court's method of calculation," that the relative rates did not raise an inference of disparate treatment (Pet. App. 416a), but the court used incorrect figures in calculating those rates. The court's analysis was also flawed by its inclusion of positions for which there were no white applicants while excluding positions for which there were no black applicants; of the 5 blacks selected, only 2 were in competition with a white applicant, in each case a white female (see note 8, *supra*). In addition the court failed to take account of the fact that although the Service in the vast majority of cases recommended only a single candidate to the county, it never recommended a black candidate without also recommending a white candidate, if one was available. In each instance where both a white and black candidate were recommended, the white candidate was always selected even though the stated reason for recommending more than one candidate was that they were equally qualified (C.A. App. 914-915).

IV. PRIOR SEGREGATION IN THE 4-H AND EXTENSION HOMEMAKER CLUBS WAS FULLY CURED BY RESPONDENTS' ADOPTION OF A GENUINELY NONDISCRIMINATORY ADMISSIONS POLICY

The narrow legal question raised by private petitioners is whether a state actor has failed, as a matter of law, to satisfy its affirmative duty to desegregate a formerly de jure system because it retained a free choice admissions system the result of which is that some all white and all black 4-H and extension homemaker clubs continue to exist (85-93 Pet. i-ii, Question 3).[39] There is no issue in this Court concerning either the validity of the lower courts' factual conclusion that the 4-H and extension homemaker clubs have been operated in a purely nondiscriminatory manner since at least 1965, or that the respondents have taken no action designed to perpetuate the prior segregation or otherwise to have a segregative effect.[40]

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[39] The precise extent of racial mixing within the 4-H and extension clubs is unclear. Between 1972 and 1980, the total number of integrated (at least one member of a different race) 4-H Clubs in mixed communities grew from 586 to 1442, while the number of single race units in mixed communities remained fairly constant (892 in 1972; 880 in 1980) (C.A. App. 1807, 1140). Of all participants in 4-H Clubs in the state, 15.7 percent belong to these 880 one-race clubs (GX 11). As of 1972, the last year for which statistics are contained in the record, only 22 out of 1866 homemaker clubs were integrated (J.A. 103).

[40] The court of appeals found that "[t]he record is totally devoid of any proof of discrimination with respect to services provided by any 4-H or Extension Homemaker Club" (Pet. App. 424a n.128). The district court likewise found no evidence of any discrimination in services or membership (Pet. App. 165a-185a) and found that any racial imbalance existing among the clubs resulted exclusively from the wholly voluntary and unfettered choice of private individuals (Pet. App. 172a). On this basis, the district court distinguished two other cases which found segregated extension-related clubs had not been dismantled (Pet. App. 175a). Specifically, the district court noted "that the Extension Service has had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race; that it instructs its agents to encourage the

Accordingly, we agree with the court of appeals' conclusion that the "mere existence of all white and all black 4-H and Extension Homemaker Clubs in some racially mixed communities violates neither Title VI nor the equal protection clause of the Fourteenth Amendment" (Pet. App. 424a n.128).[41] Prior decisions of this

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formation of new clubs without regard to race; that it publishes its policies in the media; that all of its club work and functions above the local community level are being conducted on a fully integrated basis; that its 4-H camps are fully integrated and have been for over ten years and that no person has been denied membership in any club on account of race" (Pet. App. 181a). The district court found that "[i]n working with the clubs all [Extension] agents work across racial lines" (Pet. App. 169a n.53). Although the United States and private petitioners introduced evidence that the Service had assigned agents to clubs on a racial basis until 1974 (J.A. 138-139; Tr. 1078-1079, 1994-1995, 2019-2020, 2025), they did not present the district court with a proposed finding of fact on this subject. We do not understand petitioners to argue that the court's findings were clearly erroneous, or that the Service has taken any action after the de jure period that has "serve[d] to perpetuate or re-establish the dual * * * system." *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 460 (1979). No evidence relating to the racial composition of clubs formed after the de jure period was introduced at trial, because neither the United States nor private petitioners drew any distinction between clubs formed before or after this period.

[41] The discrimination prohibited by Title VI is coextensive with that proscribed by the Constitution; our discussion will therefore address this question in terms of constitutional requirements. *Guardians* v. *Civil Service Commission*, 463 U.S. 583 (1983). The United States Department of Agriculture has promulgated regulations pursuant to Title VI which require that federal aid recipients that have "previously discriminated against persons on the ground of race, color or national origin, * * * must take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. 15.3(b)(6)(i). As discussed in the text *infra*, where, as here, admissions are traditionally the product of private voluntary choice, an entity covered by Title VI has fulfilled this requirement to take affirmative action to overcome the effects of prior segregation in admissions when it has established a genuinely nondiscriminatory admissions system. Since the regulation simply embodies this statutory and constitutional requirement, the lower courts' conclusion

Court in the school desegration area demonstrate that a state which has insured that all its practices relating to admissions are truly race-neutral need not assure a par-

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that the Service has created such a nondiscriminatory system in the 4-H and extension homemakers clubs establishes that it is in compliance with these regulations.

The Department of Agriculture sent affirmative action "guidelines" in 1972 and 1973 to the Directors of all Extension Services expressing the Department's views concerning steps those Services should take with respect to desegregating 4-H and extension homemaker clubs. These guidelines, on their face, specifically exempt the respondent Extension Service from coverage because of the pendency of this litigation (Pet. App. 173a n.55; C.A. App. 1905, 1914-1958). It is also undisputed that these guidelines are, in any event, nonbinding. The stated purpose of these guidelines is to set forth standards by which Extension Services will "assure that all Extension 4-H and other youth programs * * * are provided to all clientele on a nondiscriminatory basis without regard to race, color, or national origin" (C.A. App. 1941; see also C.A. App. 1923, 1864-1865, 1888). To accomplish this goal of nondiscrimination, the guidelines state that formerly segregated Extension Services should establish "that *all reasonable efforts have been made* to recruit individuals from all racial groups represented; and reasons for individuals not desiring to become members of such clubs in interracial settings are not based upon race, color or national origin" (C.A. App. 1905 (emphasis in original)). Respondents did not institute one of the recruitment efforts specified by the Department as part of their affirmative effort to ensure nondiscrimination: personal visits by Extension staff members to potential minority participants in the clubs (C.A. App. 1910). As a general enforcement policy, the guidelines' "personal visit" standard is an appropriate and beneficial recruitment measure to assure both the Department and the covered Extension Service that all persons are aware that clubs are truly nondiscriminatory, so that the "reasons for individuals not desiring to become members of such clubs in interracial settings are not based upon race." However, this component of the Department's affirmative action program is not an absolute prerequisite to finding that the clubs are truly nondiscriminatory. The district court's findings of nondiscrimination and that any racial imbalance is solely attributable to the free choice of persons unfettered by subtle racial barriers are not clearly erroneous. For this reason, the United States did not appeal the district court's decision on this issue.

ticular racial mix[42] or eliminate personal choice in order to cure its prior segregation.

It is well established that the Constitution does not require, either as a matter of substantive right (*e.g.*, *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)) or as a matter of remedy (*Milliken* v. *Bradley* (*Milliken I*), 418 U.S. 717, 740-741 (1974); *Swann* v. *Bd. of Educ.*, 402 U.S. 1, 24 (1971)), any particular degree of racial balance in a state's activities. Rather, the Constitution requires that government refrain from any action intentionally designed to exclude or segregate persons on the basis of race. *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton I*), 433 U.S. 406, 413 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). It is not disputed that the Service engaged in such deliberate segregation after this Court's decision in *Brown* v. *Bd. of Educ.* (*Brown I*), 347 U.S. 483 (1954), and thus "automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory * * * system.'" *Keyes* v. *School District No. 1*, 413 U.S. 189, 200 (1973), quoting *Brown* v. *Bd. of Educ.* (*Brown II*), 349 U.S. 294, 301 (1955).[43]

Such remedial efforts are necessary "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (*Milliken I*, 418 U.S. at 746) by eliminating the condition that violates the Constitution and the conditions that flow from such a violation. *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977). See *Dayton I*,

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[42] Although private petitioners do not expressly state that any particular racial mix is required, their assertion that the state's efforts have "failed" (85-93 Pet. i-ii) can only be premised on the assumption that some degree of racial mixture is necessary for "success".

[43] It is also undisputed that it was the *state's* deliberate action that caused intentional segregation in the clubs and thus constituted "state action" governed by the Fourteenth Amendment. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

433 U.S. at 417, 420.[44] Since the condition that offends the Constitution is a race-conscious admissions policy, not the absence of racial balance, the prior constitutional violation with respect to admissions is fully cured by establishing a system of admissions that "exclude[s] no [person] of a racial minority, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23.[45] Accordingly, a unitary system of admissions is one "within which no person is to be effectively excluded from any [club] because of race or color." *Alexander* v. *Holmes*, 396 U.S. 19, 20 (1969). Accord, *Green* v. *School Board*, 391 U.S. 430, 432 (1968), quoting *Brown II*, 349 U.S. at 300-301 (formerly segregated school systems must " 'achieve a system of determining admission to the public schools on a nonracial basis.' "); *Brown II*, 349 U.S. at 300 ("At stake is the personal interest of the plaintiffs

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[44] Both *Milliken* cases, like other cases cited above, concerned limitations on the remedial discretion of federal courts in segregation cases, and not what a state actor such as respondent must do in order to cure prior segregation. These cases, nevertheless, established the outermost bounds of desegregation remedial efforts because they involved the question of whether a district court has exceeded its authority by fashioning a remedy which goes beyond the "nature and extent of the * * * violation." *Milliken I*, 418 U.S. at 744. In defining the limitations on judicial remedial authority, however, these cases do not establish that every defendant must take every step a court could possibly order to cure past discrimination. For example, a district court would be authorized to require intensive affirmative recruitment efforts to cure prior discrimination. However, a state defendant that has not performed such recruitment in all particulars will nevertheless have complied with the Constitution if it arrives at the same end: nondiscriminatory admissions. (See note 41, *supra*.)

[45] Of course, a system does not become unitary in all respects simply by curing its prior discriminatory *admissions*. Rather, it must remedy all aspects of the system that have been affected by such discrimination. In the public school context this would include faculty, facilities, and the other so-called "*Green* factors." See *Green* v. *School Board*, 391 U.S. 430, 435 (1968). Our discussion is expressed in terms of admissions only because we do not understand the private petitioners to contend that the Service has not fulfilled its affirmative duty with respect to the formation of clubs or any other aspect of the clubs' programs.

in admission to public schools * * * on a nondiscriminatory basis").

To be sure, in the elementary and secondary school context, achievement of the truly race-neutral admissions scheme necessary to remedy prior segregation requires more than discontinuance of discrimination if the former unconstitutional practices have created a race-based assignment system that remains in place. Simply ending de jure segregation and returning to a neighborhood school system often will not restore the conditions that would have existed absent prior segregation, and thus will not effectively dismantle the dual system. In such school systems, student attendance districts often have been racially gerrymandered, schools may have been purposely constructed in a particular area to achieve artificial racial separation, and the location of segregated schools may well have significantly contributed to segregated residential patterns. *Swann*, 402 U.S. at 25, 28. In these circumstances, assigning students to their neighborhood school does not place students—either those who attended school during the period of de jure segregation or those who will subsequently enter the system—in the desegregated school environment (or actual school) that they would have experienced absent such prior unconstitutional actions. Accordingly, "[w]hen school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments." *Id.* at 28. To do otherwise would perpetuate the prior de jure segregation by leaving intact conditions that are directly attributable to the unconstitutional actions of state actors.

Where the state has not *assigned* persons during or after the de jure period, however, the process of disestablishing the dual system through achievement of a neutral admissions policy can be more directly accomplished. Where public officials do not assign persons to a particular program, there is no state-controlled attendance pattern, discriminatory or otherwise, to undo or

redraw. Thus, unlike elementary and secondary education, affirmative action to assure a genuine and complete termination of all discrimination in activities affecting admissions will not leave in place any discriminatory conditions caused by previous state-imposed segregation. Such a genuinely race-neutral policy will, absent any subsequent conduct that contributes to segregation, fully dismantle the dual admission system because it will restore to the victims of discriminatory conduct (and provide to others) the system mandated by the Constitution, *i.e.*, one in which each person has an equal opportunity to participate in government activities free from discrimination and racial separation attributable to state action.

This is not to say that a voluntary attendance system is unitary with respect to admissions because the state entity simply announces that it will henceforth conduct admissions without regard to race. Rather, such a formerly segregated government program is unitary only if the state has, in fact, established an admissions "system in which racial discrimination [is] eliminated root and branch." *Green*, 391 U.S. at 438. Thus, the relevant program must be free from all practices that either indicate that the program is not genuinely open to all free from subtle discrimination or that otherwise create further racial separation.

This transition will normally involve diligent oversight and remedial efforts to ensure that the defendant's existing administrative and admissions practices are not tainted by discrimination, and do not send a subtle discriminatory message, that its personnel are sensitized to the need to treat applicants and potential applicants in a wholly nondiscriminatory manner, that its present and future practices do not have the effect of impeding desegregation, and that it is made clear to all that any practices discouraging or diminishing racial mixing are truly a thing of the past. Such affirmative action by the state will ensure that a genuinely race-neutral admissions policy has been achieved, and that any subsequent racial im-

balance is thus not due to actions attributable to public officials, but to the truly free exercise of choice by private actors unaffected by subtle discriminatory exclusion.[46] Against the backdrop of recent blatant discrimination, affirmative recruitment activities in the media or otherwise will normally be an important component in this nondiscrimination effort, but the ultimate question in every case is whether the state's policies and practices are conducted in a manner that does not exclude or segregate any person on the basis of race.

In this case, as noted, the lower courts found that the respondents had fully cleansed the clubs of any such racially-based activities and that racial imbalance is solely the product of unfettered private action (see note 40, *supra*). Private petitioners do not maintain that these concurrent findings of fact are erroneous or that the respondents engaged in any action that had a segregative effect. Accordingly, for the reasons stated above, we believe the lower courts' determination that such racial discrimination had been eliminated from the system "root and branch" establishes that respondents had fully performed their duty to redress prior segregation.

The Service was not required to attain a particular racial mix in its system, regardless of whether private actors continued to retain the freedom to choose which, if any, club to attend. De facto segregation that is purely the product of private decision making, and thus not at-

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[46] The 4-H and extension homemaker clubs are not actually a part of the Extension Service, so the precise form of respondents' affirmative remedial duty is somewhat different, although no less compelling, than a state actor that must cure its own internal practices. With respect to admissions, the respondents are obliged to take affirmative action to ensure nondiscrimination against club members by the private voluntary leaders of those clubs. For example, with respect to the sole instance of discrimination by a voluntary worker in the record, the Service promptly removed the worker and admitted the black child to the 4-H Club (Pet. App. 167a n.51). Of course, the Service must also ensure that its own actions related to these clubs—formation of clubs, recruitment of leaders, provision of services—are nondiscriminatory and are not used as devices to perpetuate segregation.

tributable to any action by the state, is not proscribed by the Constitution. *Dayton I*, 433 U.S. at 413. That being so, such racial imbalance need not be eliminated in order to render an admissions system fully desegregated if the government entity has established a genuinely race-neutral admissions pattern.

This Court's decision in *Spangler* makes this clear. There the district court's adoption of a student assignment plan to remedy public school segregation "established a racially neutral system of student assignment in the [school district]." 427 U.S. at 434. After the first year of this plan's implementation, free movement of persons within the district "resulted in some changes in the demographics of [the district's] residential patterns, with resultant shifts in the racial makeup of some of the schools." *Id.* at 436. "[A]s these shifts were not attributed to any segregative actions on the part of the [school district]" (*ibid.*), the racial imbalance caused by these voluntary choices of private citizens did not mean that the district had failed to perform its duty to remedy prior segregated student assignments. Consequently, the district court's requirement that the defendants engage in additional remedial admissions practices was impermissible because it enforced a right not secured by the Constitution, *i.e.*, the " 'substantive * * * right [to a] particular degree of racial balance or mixing.' " *Id.* at 434, quoting *Swann*, 402 U.S. at 24. "For having once implemented a racially-neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previously racially discriminatory attendance patterns." 427 U.S. at 437.

Thus, just as the *Spangler* school board's adherence to the district court's racially neutral student assignment plan fully redressed previously segregated admissions notwithstanding a racial imbalance due to the voluntary decisions of private individuals, so too does the respondents' establishment of a nondiscriminatory system here

fully remedy the prior constitutional violation regardless of whether private activities beyond their control result in an absence of racial mixing. To conclude otherwise would be to equate racial balance with effective desegregation; an equation that, as noted, *Swann* and *Spangler* expressly rejected.

This principle obtains with equal force in situations where private choice, rather than official compulsion, is the means by which attendance is determined. The holding and analysis in *Green* and its companion cases (*Raney* v. *Bd. of Educ.*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968)) is limited to compulsory public education or other contexts where the government, rather than the participant, traditionally makes the decision concerning where participants in the government program will attend. Thus, *Green's* rejection of "freedom of choice" student assignment plans simply reflects the familiar rule that a system which has not yet achieved unitary status may not take steps that foster segregation where there exists a reasonably available alternative that equally or better serves the governmental purpose purportedly being furthered. And, while the "freedom of choice" plan at issue in *Green* was plainly such a segregation-inducing device, the same is not true where, as here, such private choice is the norm.

In public elementary and secondary schools, the decision whether to attend and which school to attend is virtually always made by the school district, not by the student. Accordingly, adoption of a "free choice" or "free transfer" plan which is used or operates to perpetuate the separation of the races is impermissible, at least absent persuasive justification. Utilization of such an unusual and administratively awkward admissions scheme in preference to the traditional, more efficient mandatory assignment system creates the inference that, at a minimum, the defendant school district is not striving in good faith to establish a student attendance system that is truly free from racial considerations. In such circumstances, then, it is the school officials' abdication of their normal responsibility to assign students that causes or at

least fosters segregation. Such segregation is thus directly attributable to the state, not to private actors. In short, a non-unitary school district's adoption of a "freedom of choice" plan that predictably, if not designedly, results in greater segregation than the traditional and reasonably available mandatory assignment alternative violates the district's affirmative responsibility to refrain from adopting policies that "serve to perpetuate or reestablish the dual school system" (*Columbus Bd. of Educ.* v. *Penick*, 443 U.S. at 460) in preference to less segregative and equally legitimate policies. See *Swann*, 402 U.S. at 20-21; *Columbus*, 443 U.S. at 460-462. In our view, it was precisely for this reason that the "free choice" and "free transfer" plans were struck down in *Green* and *Monroe*.

Noting that normal geographic zoning assignment was a "reasonably available" option that would greatly increase integration, the *Green* court held that a school board's preference for an attendance scheme such as "freedom of choice" "may indicate a lack of good faith; and at the least it places a heavy burden upon the Board to explain its preference for an apparently less effective method." 391 U.S. at 439. Since the use of a "free choice" plan in these circumstances clearly served no legitimate purpose particularly given the procedural and historical context in which the plan was adopted (*id.* at 432-433, 440 n.5), the school board in *Green* was unable to meet this burden. Indeed, " 'it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning.' " 391 U.S. at 442 n.6, quoting *Bowman* v. *County School Board*, 382 F.2d 326, 332 (4th Cir. 1967) (concurring opinion).

In *Monroe*, this Court was even more explicit. In that case, the "free transfer" option allowing students to transfer after initial geographic assignment, "permitted the 'considerable number' of white or Negro students in at least two of the zones to return, at the implicit invita-

tion of the Board, to the comfortable security of the old, established discriminatory pattern * * * no attempt has been made to justify the transfer provision as a device designed to meet 'legitimate local problems'; rather, it patently operates as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones." 391 U.S. at 459, quoting *Goss* v. *Bd. of Educ.*, 373 U.S. 683, 689 (1963) (emphasis in original).

No such constitutional infirmity attaches to the continuance of free choice in those situations where such choice is a traditional aspect of the government program or activity. In contexts such as public parks, higher education and the 4-H Clubs here, participation or attendance in the state activity is wholly voluntary in all respects. Unlike public schools, free choice as to whether and where to attend is a normal and important feature of the system—not, as in the public elementary and secondary school context, a newly discovered device that will clearly have a segregative effect. In such cases, a transition to officially compelled assignments would constitute a fundamental alteration of the system. It would increase government regulation of private conduct by denying individuals the liberty to attend, for example, the park that is most convenient or the university best suited to their educational needs. Accordingly, preservation of the participants' traditional "free choice" cannot reasonably be viewed as an act of bad faith or a device that encourages or perpetuates segregation. To the contrary it "serve[s] important and legitimate ends." *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton II*), 443 U.S. 526, 538 (1979).

Unlike the public schools in *Green* and *Monroe*, therefore, any lingering racial imbalance in the 4-H and extension homemaker clubs here is not attributable to unjustified segregative action by the government respondents, but solely to decisions freely made by private actors. That being so, neither *Green* nor *Monroe* suggests that the state has an affirmative duty in such circumstances to eliminate or restrict the discretion of private actors to achieve a greater racial balance. Nor has this Court ever

suggested such a rule in any other context.[47] Indeed, in the same term that *Green* and *Monroe* were decided, this Court summarily affirmed, over dissent, a three-judge court's decision that those cases' condemnation of "freedom of choice" plans was inapposite in the higher education context because admissions there are traditionally governed by private choice. *Alabama State Teachers' Ass'n.* v. *Alabama Public School & College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd, 393 U.S. 400 (1969).[48]

Thus, *Green* did not hold that the continuation of free choice is an inherent defect in a racially imbalanced system, but only that the adoption of such a scheme in the public school context is impermissible if it impedes or frustrates desegregation. Any contrary interpretation of *Green* "can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." *Milliken I*, 418 U.S. at 747. Such an understanding of *Green* would not only read into it a requirement for "mandatory integration" which that opinion expressly rejected (391 U.S. at 437), but also would bring that decision squarely into conflict with this Court's established precedent that no particular degree of racial mixing is constitutionally required. See page 10, *supra*.

Of course, the Service undoubtedly *could* have sought to increase integration by attempting to close one-race clubs, by denying club members the opportunity to join

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[47] For example, this Court issued a series of per curiam decisions following *Brown* which invalidated segregation in various state activities without any suggestion that the relevant public officials must do more than henceforth insure a nondiscriminatory admissions policy, *i.e.*, provide free choice. See *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (parks); *Mayor of Baltimore* v. *Dawson*, 350 U.S. 877 (1955) (beaches and bathhouses); *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Gayle* v. *Browder*, 352 U.S. 903 (1956) (public transportation).

[48] Of course, a higher education system must take affirmative remedial action not only with respect to admissions, but also, for example, faculty, facilities, and lingering funding disparities before it will become unitary in all respects.

the club of their choice or by discriminatorily excluding black and white children from clubs where their race predominates through preferential "other-race" goals and quotas. We fail to perceive, however, why such actions are in any way necessary to vindicate the constitutional rights of those persons whose unfettered access to government-supported programs is being so restricted. Where a state has unlawfully segregated railroad cars, for example, the state is not constitutionally required to compel blacks to sit in the previously all-white railroad car or to restrict access to the car formerly reserved for blacks. By the same token, so long as the Service ensured equal access to the clubs and did not engage in practices that impeded desegregation, it was not required to restrict persons' normal discretion to join the club of their choice, even if those persons exercised their unfettered choice to join a club in which their race predominates.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed in part, affirmed in part, and remanded.

Respectfully submitted.

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Nos. 85-93 and 85-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Were the salary claims correctly rejected when:

   a) No pattern or practice of intentional racial discrimination was found by the district court and the jobs of NCAES agents were not found to be similar or typical because of county by county differences and,

   b) The statistical evidence was properly rejected as being inaccurate and failing to utilize known valid non-discriminatory factors affecting each agent's salary in a different manner?

2. Were the claims of discrimination in connection with selection of county extension chairmen correctly rejected when:

   a) The district court and court of appeals properly applied disparate treatment analysis requiring proof of intentional discrimination in connection with decisions to select county extension chairmen, and

   b) The county chairman selection process and statistics, analyzed according to *Teamsters* and *Hazelwood* revealed no intentional discrimination in violation of Title VII and 42 U.S.C. Section 1983, and

   c) The district court and court of appeals analysis of county extension chairmanship claims was not in conflict with *Arizona Governing Committee v. Norris*, 403 U.S. 1073 (1983)?

3. Were the claims of violation of Title VI in connection with the 4-H and Homemaker Extension programs correctly rejected when there was no evidence of discrimination or denial of services in connection with the programs?

4. Was class certification correctly denied pursuant to Rule 23, Federal Rules of Civil Procedure when:

a) The facts showed that NCAES employees were not similarly situated and lacked commonality in connection with their employment conditions, and

b) The facts showed that the 100 boards of county commissioners proposed as a defendant class were each independent and autonomous in connection with each county's NCAES program and employment, and

c) The case was tried as a pattern or practice case with both petitioners seeking the same relief?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	22
ARGUMENT:	
I. THE DENIAL OF THE SALARY CLAIMS WAS CORRECT AND SHOULD BE AFFIRMED	25
A. NCAES agents, regardless of race, are not similarly situated nor performing the same jobs	27
B. The District Court and Court of Appeals correctly applied *Teamsters*, *Hazelwood* and *Evans* to the salary claims	29
C. The Evidence does not reveal any Pre-Act intentionally set wage scales existed in NCAES	30
D. The Evidence shows the salary process to be non-discriminatory	34
E. Petitioners' statistical cases were properly rejected	36
F. The Petitioners failure to include known factors affecting salaries was deliberate and not the result of surprise	39
II. THE COUNTY CHAIRMAN SELECTION CLAIMS WERE PROPERLY REJECTED	41

TABLE OF CONTENTS—Continued

Page

III. NCAES' 4-H AND EXTENSION HOMEMAKER CLUBS ARE NON-DISCRIMINATORY AND IN COMPLIANCE WITH TITLE VI 47

IV. THE DENIAL OF CLASS CERTIFICATION WAS CORRECT 51

CONCLUSION 56

TABLE OF AUTHORITIES

Cases: Page

Arizona Governing Committee v. Norris, 408 U.S. 1673 (1983) 23, 41, 46
Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979) 50
Cooper v. Federal Reserve Bank of Richmond, 467 U.S. ——, 81 L.Ed.2d 718 (1984) 24
Dothard v. Rawlinson, 433 U.S. 312 (1977) 23
EEOC v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980) 44
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) .. 24, 55
General Telephone Company of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980) 24, 54
General Telephone Company of Southwest v. Falcon, 457 U.S. 147 (1982) 52
Green v. School Board of New Kent County, 391 U.S. 430 (1968) 47
Hazelwood School District v. United States, 433 U.S. 299 (1977) 22, 29, 43, 44, 45
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 5, 22, 23, 29, 43
McDonnell-Douglas v. Green, 411 U.S. 792 (1973) .. 22
Paxman v. Campbell, 612 F.2d 848 (en banc) (4th Cir. 1980) 53
Pullman Standard v. Swint, 456 U.S. 273 (1982) 22, 42
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 23
United Airlines v. Evans, 431 U.S. 533 (1977) 22, 29
United States v. City of Chicago, 573 F.2d 466 (7th Cir. 1978) 50
United States v. State of S.C., 434 U.S. 1026 (1979) 53
Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981) 37, 38
Wilkins v. University of Houston, 695 F.2d 134 (5th Cir. 1982) 37

TABLE OF AUTHORITIES—Continued

Constitution, Statutes and Regulations:	Page
Civil Rights Act of 1964:	
Title VI	*passim*
Title VII	*passim*
Equal Pay Act, 28 U.S.C. § 206	27
28 U.S.C. § 1291	24, 25
42 U.S.C. § 1983	27
42 U.S.C. § 2000d	1
42 U.S.C. § 2000h-2	1
42 U.S.C. § 2000d-1	1
42 U.S.C. § 2000e, et seq.	1
Rule 23, Federal Rules of Civil Procedures	24, 51, 52, 54, 55
7 C.F.R. 15.1	50

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

This action was instituted in the U. S. District Court for the Eastern District of North Carolina on November 18, 1971, by more than fifty employees of the North Carolina Agricultural Extension Service (NCAES) alleging racial discrimination in employment and the provision of services by NCAES on behalf of 5 purported classes of blacks and indians. The United States was named as a defendant in the original action but was allowed to become a plaintiff and intervened in the action on April 7, 1972, under Section 902 of Title IX and Sections 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, 2000d and 2000d-1.

The United States was permitted to amend its complaint in intervention by Order of October 9, 1979, to include allegations of a pattern and practice of racial discrimination in violation of Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Class action certification sought by the plaintiffs and the United States was denied. (J.A. 73-79)

On November 23, 1981, the plaintiffs moved to amend their complaint to allege violations of Title VII and the motion was allowed. The defendants denied all allegations of discrimination. The nonbifurcated trial of this action began on December 7, 1981, and ended with final arguments on February 12, 1982. Counsel for the United States and plaintiffs acknowledged that the case was one of alleged disparate treatment and that the plaintiffs and the United States had the burden of proving a pattern or practice of intentional discrimination against the defendants. (Tr. 10,13,16). The plaintiffs and the United States joined in common cause, called over 46 witnesses to testify, and introduced over 400 of exhibits. They rested their case on December 29, 1981. (Tr. 3021, C.A. App. 49)

The defendants' case began on December 31, 1981 and the defendants called over 15 witnesses and introduced over 250 exhibits. The United States and the private plaintiffs took one day for rebuttal. (Tr. 6411-6617). (C.A. App. 102) (Tr. Vol. 32).

On August 20, 1982 and September 17, 1982, the Court entered Judgments dismissing all claims against NCAES. In its decision of August 20, 1982, the Court found as follows:

(a) That this was not a proper action to be certified as a class action pursuant to Rule 23, Federal Rules of Civil Procedure. (C.A. App. 49) This Finding was appealed.

(b) That blacks are not discriminated against in geographical employment assignments in NCAES. (C.A. App. 53) *This Finding was not appealed.*

(c) That NCAES does not discriminate in recruitment of black professional employees. (C.A. App. 53) *This Finding was not appealed.*

(d) That NCAES does not discriminate in hiring black professionals at the county and state levels and NCAES's selection procedures are non-discriminatory. (C.A. App. 62) *This Finding was not appealed.*

(e) That NCAES does not discriminate in assignments of professional personnel to areas of responsibility (i.e. crops, livestock). (C.A. App. 64) *This Finding was not appealed.*

(f) That NCAES does not discriminate in title promotions of county level professional employees (from assistant to associate to full agent) and the performance evaluation system used in connection with promotions of county level professionals was valid, and non-discriminatory. (C.A. App. 74) *This Finding was not appealed.*

(g) That NCAES does not discriminate in the selection of county extension chairmen. (C.A. App. 101) This Finding was appealed.

(h) That NCAES does not discriminate in the selection of state level positions such as director, program leaders, specialists, and district chairmen. (C.A. App. 106) *This Finding was not appealed.*

(i) That NCAES does not discriminate with respect to terms, conditions and privileges of employment. (C.A. App. 72) *This Finding was not appealed.*

(j) That NCAES does not discriminate in connection with salaries. (C.A. App. 150) This Finding was appealed.

(k) That NCAES does not discriminate in work assignments. (C.A. App. 152). *This Finding was not appealed.*

(l) That NCAES has established valid, non-discriminatory qualifications, tests, selection standards and procedures in hiring and promotion. (C.A. App. 158) *This Finding was not appealed.*

(m) That NCAES has taken appropriate action to correct the present effects of past racially discriminatory policies and practices. (C.A. App. 163). *This Finding was not appealed.*

(n) That NCAES provides equal services to minorities. (C.A. App. 164). *This Finding was not appealed.*

(o) That NCAES' services to farmers and other persons are provided on non-racially segregated basis. (C.A. App. 164). *This Finding was not appealed.*

(p) That NCAES is not in violation of Title VI in the delivery of services to 4-H and Extension Homemaker Clubs. (C.A. App. 185). This Finding was appealed by Petitioners but not by the United States. *The United States now argues that the decision be affirmed.* (Brief U.S. p. 37-50)

(q) That the case was a disparate treatment case, and NCAES did not engage in a pattern or practice of racial discrimination. (C.A. App. 205)

In its decision of September 17, 1982, the Court analyzed the individual claims of 42 plaintiffs and determined that none were entitled to relief. (Pet. App. 215a-345a)

The United States and Petitioners appealed to the fourth circuit. The United States appealed from only *3* of the 16 adverse rulings. The plaintiffs appealed from only *4* of the foregoing adverse rulings: salaries, county extension chairmen, 4-H and Home Economics and class action denial.[1]

Decision was rendered by the court of appeals on December 10, 1984, affirming the district court's two judgments. Judge Phillips dissented on three claims, to wit: the 4-H Club claims, class action and salaries. He affirmed in all other respects. Petitions for Rehearing and rehearing *en banc* were denied by an evenly decided court on April 15, 1985.

STATEMENT OF FACTS

Preface

It is important to bring this case into proper focus and perspective. This case involved considerable time in trial and took both the district court and the court of appeals a long time to decide. A review of the district court opinions on the pattern or practice claims and the individual claims reveals careful consideration, thought and study by the district court in reaching and explaining its decision to deny all claims for relief. The United States and plaintiffs attacked each and every facet of the NCAES employment practice from initial hire to salaries and promotions. The United States and plaintiffs claimed discrimination in the services provided by the NCAES to

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[1] References throughout this brief to the Court of Appeals appendix which appear in the following format: (C.A. App. 0000"B" or "Y") contain a reference to the defendants' proposed findings of fact which were marked by plaintiffs and the United States pursuant to the district court's instructions in either red, blue or yellow. "B" refers to facts which were marked in blue and means facts not in dispute. "Y" refers to facts which were marked in yellow and means facts not in dispute but considered irrelevant by plaintiffs. Copies of the defendants' proposed findings of fact marked by the United States and private plaintiffs are found in docket number 231, 232.

the people of North Carolina. Yet a review of the petitioners' briefs filed with this Court, and the Petitions for Writ of Certiorari which brought the case here do not present an accurate factual picture of NCAES or its employment practices as a whole.

Why are the facts about NCAES relating to all issues that were tried important? The answer is simple. The petitioners and the United States tried this case as a pattern or practice action under Title VII asserting claims of intentional discrimination (disparate treatment) by NCAES against blacks. At trial the evidence showed that NCAES agents, due to the structure of NCAES and county by county vacancies, were not performing the same jobs or similarly situated, whether black or white. Yet petitioners assert that white agents and black agents perform the same work and are similarly situated. Also the facts about NCAES are important because petitioners cite *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) at length in reference to the burden of proof and other issues. By sweeping the facts about NCAES and non appealed issues under the rug, they fail to state that *Teamsters* required them to prove a pattern or practice by showing racial discrimination was NCAES' standard operating procedure and usual practice. *Teamsters, supra*, 336.

The district court found (1) no discrimination in hiring (2) no discrimination in recruitment (3) no discrimination in service training (4) no discrimination in NCAES providing blacks with opportunities to secure masters degrees while employed (5) that NCAES had used a valid, non-discriminatory performance evaluation system (6) that NCAES utilized the valid, non-discriminatory performance evaluation system in promoting blacks and whites in agent positions and in determining merit salary raises (7) that NCAES did not discriminate in assignments and (8) that NCAES did not discriminate in selection of county extension chairman or any of its programs. This is further bolstered by the decision on

individual claims in which the district court carefully weighed the evidence in each case and found no discrimination. In employment, only salaries and chairmanship selection were appealed. In these two employment issues, petitioners argue that a pattern or practice of discrimination was the regular standard operating procedure while omitting to mention that no regular systemwide pattern or matter of discrimination was found.

Petitioners have elected to omit the total picture from their arguments and to rest on the inaccurate claim that white agents and black agents perform the same jobs in similarly situated environments as if NCAES were a factory setting. Because of this, a review of the facts relating to NCAES's organization, employment practices and services is required so that fair balance and equilibrium can be re-established.

Organization of the
North Carolina Agricultural Extension Service

NCAES' programs and functions are educational in nature and are of great social and economic importance to the citizens of North Carolina and the counties where they reside. NCAES' programs and areas of emphasis fall into four general categories: agriculture, home economics, 4-H youth development and community resource development (CRD). (C.A. App. 212"B").

The State of North Carolina is composed of 100 counties and the Cherokee Indian Reservation. Each county has its own governing body known as the Board of County Commissioners. The County Commissioners are autonomous. The relationship between the Boards of County Commissioners and the NCAES is set forth in a "Memorandum of Understanding" executed by each county and NCAES. (C.A. App. 212"B", J.A. 161).

Under the Memorandum of Understanding, the Extension staff recommended by the NCAES to each county must be concurred in by the County Commissioners. In all instances, the person or persons recommended by

NCAES for consideration as County Extension Chairman is approved by the Board of County Commissioners. County contributions to professional salaries vary from county to county depending on factors such as county size, county wealth and tax base, county interest in the program the agricultural or rural thrust and nature of the county itself. (C.A. App. 213, 541-50, 1683-87, 2181).

North Carolina counties vary greatly in population, rural/urban population, size, racial makeup, topography, agrarian needs and resources, NCAES determines the agricultural, 4-H, home economics and community development needs of each individual county with the help of a system of advisory councils known as the County Extension Advisory Leadership System. (C.A. App. 213-14 "Y").

Because of the wide variance among North Carolina's counties, the requirements for extension staff vary greatly from county to county. The needs of a particular county dictate the areas of subject matter responsibility and training that extension agents must possess to serve within the particular county. (C.A. App. 216 "Y"). Agents cannot be required to move from county to county nor fill an opening for which the agent is not qualified by education, training or interest to fill. (C.A. App. 216, 560-67, 599-605, 2753).

One cannot review the employment or salary situations of NCAES county level professional staff without first looking at the individual needs and the conditions of the particular county at the time that such an employment or salary decision was made. (C.A. App. 216, 510, 599-608).

The head of the Extension Service is the Director and Associate Dean of the School of Agriculture and Life Sciences at North Carolina State University. There is an Associate Director. Directly beneath the Associate Director there are five Assistant Directors of the Extension Service. (C.A. App. 217-18 "B").

There are six District Extension Chairmen. The District Extension Chairman is responsible for administering all extension personnel and programs in each of the counties within his or her district. (C.A. App. 218 "B").

The Extension Service employs specialists. A Specialist has technical expertise in a particular subject matter area and provides technical assistance at the county and/or district level. Approximately two-thirds (2/3) have Ph.D. degrees. (C.A. App. 218-19 "B").

There are twelve District Program Leaders. Each program leader has responsibility in two of the six districts in one of the program areas: (1) Home Economics; (2) Agriculture; (3) Community Development; or (4) 4-H.

There is a County Extension Chairman position in each county which is the top county administrative position. The County Chairman (CEC), is responsible for carrying out an effective county extension program. The CEC also carries particular subject matter responsibilities such as agronomy, tobacco, 4-H, or home economics depending on the needs of the county and expertise of the staff. The CEC reports to the County Commissioners and works with them on budgeting and personnel matters which require county funds and participation. (C.A. App. 220 "B").

The County Extension Agent is responsible for assigned areas of subject matter responsibility. Agents are employed to work in a particular county position for which they must apply. (C.A. App. 54). There are three ranks of Extension Agents. The first is Assistant. The second is Associate requiring 3 years of service or equivalent experience. The third is called Extension Agent and requires a minimum of seven years of service or equivalent experiences. Educational degrees may reduce service year requirements. The Assistant, Associate, and Extension Agent perform the same types of tasks within their subject matter areas such as livestock or Home Economics. When an agent is promoted, his or her responsibilities increase and a higher level of performance

is expected. (C.A. App. 221 "B", 589, 99, 1035-38, 1174-75, 2235, 2253-75).

An agent is employed to fill a vacant position, for which the agent was selected by virtue of his or her skill and training. (C.A. App. 222 "B", 54).

Most agents' and chairmen's salaries consist of a federal share, a state share, and a county share. The federal government allocates money each fiscal year. These funds are combined with funds appropriated by the General Assembly to support salaries of Extension employees. (C.A. App. 223 "B"). The NCAES in consultation with the Board of County Commissioners determines what the state's share of each agent's salary in that particular county will be and what share the county will pay. The percentage of salaries that were paid from county funds in 1981 ranged from a high of 57% in Forsyth County to a low of 18% in Camden County. This percentage variation results in differences between salaries from county to county and agent to agent. (C.A. App. 223 "B", 546-51, 598-610, 1321-24, 2181-90).

Agricultural Program

The largest program area of the NCAES is its agricultural program which educates and encourages farmers to adapt scientific methods to meet individual needs and to adjust to changing economic conditions. Approximately 47-50% of all NCAES professional time is spent on agricultural programs. (C.A. App. 47, 224 "B", 2324-25).

The agricultural programs within NCAES are determined by the needs of the particular counties and varies greatly with each individual county and region of the state. (C.A. App. 224 "Y", 226 "Y").

Petitioners alleged racial discrimination in agricultural programs but there was no evidence to support the allegations of trial. At the close of petitioners' evidence, Counsel for the government conceded that the defendants

were not discriminatory in connection with services. (Tr. 3285-6, 672).

The Extension Home Economics Program

An extension home economics program is operated in each of North Carolina's 100 counties and the Cherokee Indian Reservation. The home economics program helps families solve problems and improve the quality of their lives through educational programs. Approximately 17.5%-23% of extension professionals' time is spent in the Home Economics program. (C.A. App. 228 "B", 260, 2325).

Programs are delivered at the county level by home economics agents and volunteers. (C.A. App. 228 "B").

Special Interest groups are open without regard to race and are formed to provide short term education on a particular subject within Home Economics.

Extension Homemaker clubs are volunteer groups organized to receive an educational in home economics through agents and volunteers. Club members participate on a strictly voluntary basis. Membership is open to everyone. Some clubs have members of one race both all black and all white and some are integrated. Only about 20% of total extension home economics program relate to these clubs. (C.A. App. 233, 573-74, 1390-92).

The district court found that there was no inequality of service and memberships were entirely voluntary. No black or white member of any extension homemaker club came forward and testified there had been any discrimination in services or membership. (C.A. App. 93,96)

The district court found that NCAES has organized all phases of activity above the community club level on a completely integrated basis and all agents worked with clubs across racial lines. (C.A. App. 234, 1390, Johnson D. 56, 51).

It has been the policy of NCAES that all extension homemaker clubs be organized without regard to race.

Prior to 1970 and thereafter all extension homemaker clubs were requested to certify membership would be open without regard to race. All clubs executed such certificates and they are on file with NCAES. NCAES' home economics agents encourage the formation of clubs without regard to race. Public media and publications carry announcements of formation of clubs and state that they are open without regard to race. (C.A. App. 96, 233, 854, 858, 866-68, 876, 886-87, 973, 1003, 1393-95). The district court found no discrimination in any aspects of the program. (Pet. App. 184a-185a)

Despite the policy that extension homemaker clubs be organized without regard to race, clubs do exist with members of only one race. Recognizing that the services and benefits that NCAES should provide to individual citizens *without regard to race* NCAES decided to continue to provide support to the extension homemaker clubs which had members of only one race rather than to deprive citizens of obtaining beneficial information. The district court found that the clubs have not denied anyone membership on the basis of race nor subjected anyone to discrimination. (Pet. App. 185a)

The private petitioners appealed only with respect to one race clubs while the U.S. argues the district court was correct.

4-H and Youth Program in North Carolina

The 4-H and Youth Program in North Carolina is one of the four major educational programs of the NCAES. The 4-H program is designed to develop good character and citizenship and to teach youth useful and practical skills. (A. 235 "B").

The 4-H program operated primarily in the schools until the early 1960's when a decision was made to develop a community based 4-H program. Since the early 60's the 4-H program has been an informal, voluntary and out-of-school educational endeavor. (C.A. App. 235 "B").

During the 1980 program year more than 95,000 young people and 15,000 adults took part in 4-H. It is the policy of NCAES that 4-H programs be operated without regard to race. (C.A. App. 236 "Y", 1013-16, 1074-77, 1092-93, 1095-98).

The local 4-H unit—be it a community club, or special interest group—is largely autonomous and completely voluntary. A volunteer adult is the leader. NCAES staff stress that all 4-H clubs and functions are open without regard to race. (C.A. App. 237, 844, 939-44, 1092-98, T. 4249, 5108-10).

The 4-H program is publicly supported by county, state and federal governments. For every $1 of public expenditure, there is a contribution of private money or services, amounting to $5-$6. The value of 4-H volunteers time exceeds $10 million. (C.A. App. 238 "Y", "B").

Within the county 4-H program there are 3 grass roots level organizations, community clubs, project clubs and special interest groups. None exclude participants on the basis of race. Within North Carolina there are community clubs which have members of one race and community clubs which have members of all races. NCAES does not participate directly in the administration of community clubs. However, NCAES 4-H agents assist in the organization efforts, Announcements are made that clubs will be organized without regard to race. 4-H agents encourage community clubs to form with both races when that club is in a racially mixed community. (C.A. App. 238 "B", 954-58, 1094-98, T. 4430-33).

4-H Special Interest groups are formed to provide short term instruction on a particular subject and were pioneered in North Carolina. These volunteer operated groups were designed to include large numbers of youth without regard to race. (C.A. App. 239 "Y"). More youth participate in special interest clubs in North Carolina than in the community based 4-H clubs. (C.A. App. 239, 583-85, 868-70, 945, 1018-21, 1077). The petitioners attack is on the community 4-H clubs.

The 4-H program in each county is dependent on volunteer adult leaders. Leaders are encouraged to form clubs on an integrated basis. (C.A. App. 239 "B"). Above the community club level every phase of 4-H within each county is fully integrated. (C.A. App. 240, 844-46, 853-54, 1022-23, 1120-22).

Although many states in the south closed their 4-H camps in 1964 and 1965, NCAES continued camp operations. In 1965, NCAES began scheduling counties and clubs within counties to deliberately achieve an integrated mixture. By 1972, complete integration within NCAES' 4-H camps was achieved. (C.A. App. 240-41, 847-52, 948-54, 1013, 1024).

The population of North Carolina is approximately 22% percent black. 4-H membership has remained 32% percent or more black since 1972. Since 1972, volunteer leadership has nearly doubled with the percentage of black leaders 27% percent or greater. (C.A. App. 241, 1099, 1106, 111-12, 1123-27, 1142-55, 2249, 2250-5, 2252).

Despite the policy of NCAES that 4-H community clubs be organized without regard to race, clubs do exist with members of only one race. Recognizing the benefits 4-H provides without regard to race, NCAES decided to continue to provide support to 4-H clubs which had members of only one race rather than to deprive children from obtaining valuable experiences. These clubs have not denied anyone membership on the basis of race. (C.A. App. 241, 961-64, 1025-34, 1156-61).

No one came forward at trial and testified of any discrimination or inferior services in connection with the 4-H program, except one instance in which the offending volunteer adult was immediately removed. (Pet. App. 167a).

The Community Resource Development Program

The Community resource development is another major program of NCAES. Extension's community development programs give emphasis to group action through citizen

groups and organizations. These organizations conduct programs built around community problems and needs. (A. 47, 242 "B", DX-65). The district court found there was no racial discrimination in CRD programs. (C.A. App. 56, 88, 93).

NCAES Employment Practices

1. ***Recruitment-County Level Positions***

The District Court found that NCAES' recruiting practices were designed to obtain the highest qualified applicants. This finding was not appealed. (C.A. App. 246-348).

2. ***Hiring—County Level Professional Positions***

The differing agricultural, social and economic needs of North Carolina's one hundred counties require a great variety of educational background and areas of specialty. Each county is not staffed at the same level of county agent personnel and the minimum staff numbers 2 to staffs exceeding 10 in number. (C.A. App. 244, 599-608, DX 67-1-100). Since November 1972, NCAES has sent monthly vacancy announcements to educational institutions, and the extension office in each county. (C.A. App. 245-46 "B").

The needs and size of the particular county and its programs dictate the qualifications of agent applicants. The agent determines whether to apply. The work required in one position is not the same as required in another position. NCAES employees are hired to fill vacant positions for which they are qualified and can not be "assigned" from county to county. Applicants who lack the skills and background required in a county position vacancy are not considered. (C.A. App. 224, 250, 738-39, 748, 750, 1332-33).

The district court found that subject matter requirements differed for each vacancy because of the needs of each county. The district court also found that county hiring procedures were non-discriminatory, that no evi-

dence was offered to show one qualified black who applied was not accepted and that no employee was ever discharged on account of race. (Pet. App. 62a).

The district court also found that there was no discrimination in connection with hiring blacks to work in any particular county or assignments to an area of responsibility. (Pet. App. 64a) None of these findings was challenged on appeal.

3. *Hiring and Recruitment—State Level Positions*

State level professional positions comprised, as of November, 1981, some 200 positions or .30% of the professionals employed within NCAES. These positions are specialists, program leaders, district chairman, assistant directors and directors. (C.A. App. 2233). No discrimination was found in connection with state level positions and the district court found state level hiring procedures to be valid and to comply with all employment discrimination laws. (Pet. App. 106a) These findings were not appealed.

The Performance Evaluation System

The NCAES performance evaluation system was found by the district court to be valid and non-discriminatory. (Pet. App. 154a-158a). The petitioners have not challenged the district court's findings. The NCAES performance evaluation system is the means for evaluating county level professional employees' job performance as part of determining their eligibility for title promotion, merit salary increases and selection to the position of county extension chairman.

The *Performance Review Guide* is utilized in connection with the annual cycle of performance review, analysis and planning within NCAES. (C.A. App. 260-261 "B"). The district court specifically approved the evaluation process utilizing the *Performance Review Guide*, and found it valid and non-discriminatory. (Pet. App. 154a-158a).

The *Performance Review Guide* becomes the final evaluation and is retained by the district extension chairman for use in the agents title promotions and merit salary considerations. (C.A. App. 261-62 "B").

Promotions at the County Level Agent Positions

This segment of the NCAES employment practices is referred to as title promotions and involves the process of promotion of agents from assistant to associate to full agent. It does not include county extension chairman. The district court approved the title promotion process utilizing the performance evaluation system as valid and non-discriminatory. These findings were not appealed. (Pet. App. 73a-74a).

County Extension Chairmanship Selection Process

The position of County Extension Chairman ("CEC") is important within the Extension Service and is the top county administrative position. The CEC is responsible for carrying out an effective county extension program. He or she carries particular subject matter responsibilities depending on the needs of the county staff. The CEC reports to the County Commissioners on programs, budgeting and personnel which require county participation. (C.A. App. 220 "B", 275 "B").

From 1972, to May, 1981 there were 77 CEC vacancies. All were announced statewide by publication. The announcement listed the county and subject areas of responsibility the CEC must carry. (C.A. App. 275, 276, "B", 278, "B", 60). The district court found that "the claims of the plaintiffs based on alleged racial discrimination by the Extension service in the selection of county chairman must fail." (Pet. App. 101a).

The CEC is not in a promotional line with that of extension agent. The CEC of a particular county is a position which must be specifically applied for when a vacancy occurs. (C.A. App. 275, 779, 1334-40). The needs of the county dictate the skills required for each CEC.

An individual is eligible for consideration as a CEC upon completion of six years (formerly seven years) of service or equivalent experience. At least two years must have been with NCAES. A Master's degree is desirable. The position demands serious consideration in selection of a qualified candidate because of administrative and leadership requirements. The District Extension Chairman meets with the County Commissioners to discuss the particular subject matter competencies required by the county. Then the District Chairman and state administrative staff prepare the statewide vacancy announcement. (C.A. App. 275, 276 "B", 780, 1334-40, 1760-62).

Applicants must apply in writing and possess minimum qualifications to be considered and interviewed. Important factors are subject matter expertise required in the county, demonstrated leadership, demonstrated administrative and management capabilities, educational background, and human relations and communications skills. When an applicant is an agent within NCAES, his or her performance in managing extension programs is well known due to the performance evaluation system. (C.A. App. 276-77, 781-789, 1000, 1334-40).

The applicant is interviewed by the District Extension Chairman, the Assistant Director for County Operations, the Associate Director and Director of NCAES. Then the group comes to a consensus as to who they will recommend to the County where the vacancy occurs. (C.A. App. 277, 789-91, 1334-40).

In some instances, more than one applicant will be presented for interview and selection. In some instances one candidate will be presented. As the County Commissioners have a definite right of approval, they may dictate how they want the applicants presented. In all instances, the Board of County Commissioners have the final say as to whether to accept an applicant. (C.A. App. 277-78, 790, 98, 1334-40, T. 3362-63, 5962-65).

At trial petitioners pursued the claims of alleged racial discrimination in the CEC selection process on two fronts.

One was statistical and the other was by utilization of the testimony of individual blacks and plaintiffs who claimed that they had been discriminated against in the selection process or that they believed it "futile" to apply.

The district court had before it not only statistical evidence, but the evidence relating to some 23 blacks who claimed discrimination in the CEC selection. (Pet. App. 93a-101a, 227a-301a) Those 23 individuals, however, comprised all blacks who applied for CEC positions or claimed to be futility claimants for CEC from 1968-1981. (C.A. App. 1736-1742, 60-69, 115-161). In each instance, the district court found no discrimination with respect to these individuals' CEC selections. (Pet. App. 227a-321a). The district court found no pattern or practice of discrimination in CEC selection and determined that the post Act selection procedures were fairly and uniformally followed without bias or prejudice. (Pet. App. 101a)

The Salary Process

The salary process for NCAES county level professional positions is affected by a multitude of factors which interact with each individual agent's employment situation on the county level and clearly shows that agents are not similarly situated in terms of their jobs regardless of race. (C.A. App. 280, 628-30, A. 755, T. 1008, 3483).

The organization establishes a minimum entry level salary for all new employees at the Assistant Agent level with a bachelor's degree and no prior experience. A salary differential is offered to those holding a master's degree at the time of employment. (C.A. App. 280 "B"). On occasions, due to "market demand", the NCAES has paid more than minimum entry level in order to employ individuals in particular subject matter fields where skills were in short supply. There have been occasions when a new employee with prior relevant experience justified a salary higher than entry level. (C.A. App. 280, 2210, 2181-89, 1322-23).

In recent years, due to inflation, starting salaries have increased dramatically. In order to compete this has required NCAES to continually adjust its entry level salary. Because of this, new agents have been employed at salary levels close to agents with two years of tenure. To avoid negative impact on staff morale, NCAES adjusted salaries on a number of employees to bring them up to new minimum levels following each increase in entry level. In 1981 NCAES was forced to utilize $70,000 of its merit salary money to make these adjustments. (C.A. App. 280, 629-30, 643, 823, 990, 1008, 1389).

After initial employment, the individual agent or County Chairman's salary is affected at any given time by a great number of factors such as tenure, additional degrees obtained, area of specialization, area of responsibility, job performance, scope and complexity of the p ogram, ability of the county to pay, state and county across the board raises, state and county merit raises, competition in the marketplace for holders of certain educational background and skills, and competition between counties for a particular agent's talents, none of which have anything to do with race. (C.A. App. 281, 492, 547-48, 608-11, 631-34, 775-57, 992-93, 2210, 2181-89, T. 3483-87).

The financial ability of counties to support the local Extension program and the salaries of its agents varies considerably throughout the state. (C.A. App. 281 "B").

Most years, the General Assembly provides some type of across the board percentage pay increase or a flat sum. These raises are non-discriminatory and every NCAES employee gets them in the state/federal percentage of their salary. The amount will vary depending upon the percentage of state contribution to their salary in the county. (C.A. App. 281, 494, 644-50, T. 1182).

From time to time a county may grant across the board pay increases. Some counties may not grant such

increases at the same time. Such increases are non-discretionary and are administered in a non-discriminatory manner. The granting or failing to grant a salary increase in some counties and not in others causes variation in agents' salaries between counties. (C.A. App. 281-82, 639-44, 987-90).

Each year, approximately 10% of the counties make available to NCAES funds to provide merit salary increases based upon performance evaluation. This results in variation in salaries between agents in different counties. (C.A. App. 281-82, 535-37, 639-44, 760-61, 765-66, 770-73, 801-2, 819-23, 987-90).

Some years the General Assembly appropriates funds to provide state employees with "merit" salary increases. (C.A. App. 282 "B"). Merit salary increases do not occur on an annual basis. The major factor is job performance following the agent's last merit salary increase. (C.A. App. 282-3, 614-16, 760-761, 765-766, 770-773, 801-802, 819-823, 1322-23, 1382-83, DX 92, 92a, 93).

The valid job performance evaluation system forms the basis for determination of an agent's eligibility for a merit salary increase through the use of the quartiling process. Quartiling is *only* utilized in the allocation of state merit funds. (C.A. App. 283, 1382-1383).

The District Extension Chairman, based upon the agent's performance places each agent within one of four quartile groups. Because each agent's particular plan of work and job requirements differ from agent to agent and county to county, agents do not compete against other agents' performance to achieve a quartile ranking. Agents compete against themselves as their performance is measured on an individual basis. Once an agent is placed in a quartile, the agent is not ranked within the quartile. The four quartile groups rank all agents within the district regardless of their areas of responsibility, degree or tenure. (C.A. App. 283, 284-5, 612-23, 814-18, 1055-57, 1376-79, 1374-1383).

An agent whose performance has improved during the performance review period may move to a higher quartile. An agent whose performance has declined during the performance review period may drop to a lower quartile. (C.A. App. 284-5, 814-818, 1380-81, 1325-30).

An agent with two years of service can expect to be placed in the first quartile if he or she does an outstanding job, just as an agent with ten years service can expect to be placed in the first quartile for an outstanding job. The converse is also true. (C.A. App. 285, 814-18, 1374, 1382, 1386-1388).

Before the allocation of merit money can be made, the District Extension Chairman must first apply merit funds to agents' salaries to adjust for any increases by NCAES during the previous performance period in the entry level salary for positions of assistant, associate and full agents. (C.A. App. 286, 287 "B", 629-30, 823, 990, 1008, 1386-7).

An agent whose performance is fourth quartile usually will not receive a merit increase. However, the agent in the fourth quartile whose salary was below the entry level salary, will have received the "entry level" adjustment made prior to the merit salary allocation process. (C.A. App. 287 "B", 1386-7).

The dollar allocation to each agent within a quartile will basically be the same. (C.A. App. 228, 819-822, 1331-32, 1388).

The quartiling process highlights that NCAES agents are not performing the same jobs under the same conditions. From initial hire on, each agent competes against his or her own job performance goals for merit pay and his or her jobs is different in and of itself. This coupled with the variances between counties and different job responsibilities dictated by county needs makes each agent's job unique.

SUMMARY OF ARGUMENT

I. The court of appeals correctly decided the salary claims of petitioners in this disparate treatment case. The district court properly analyzed all claims by the allocation of proof set for disparate treatment cases, which claims require proof of intentional discrimination. The district court and court of appeals correctly followed *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973); *Teamsters v. United States*, 431 U.S. 234 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977) in requiring petitioners to prove their assertions of intentional discrimination. In each instance, petitioners failed to do so. The existence of intentional discrimination is for the trial court to decide. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's two decisions clearly show this was carefully decided on the facts.

Petitioners tried this disparate treatment pattern or practice and individual claim case without regard to the particular facts surrounding NCAES, its special requirements for hiring, staffing and without regard to the real non-discriminatory factors which clearly affect salary differences between all agents irrespective of race. Petitioners come here asserting the same old arguments which have failed them in the past.

NCAES employees are professionals with college degrees required. Each of 100 counties has needs for different training and educational skills for NCAES agents. Salaries are not now, nor have they ever been, the same except for the minimum starting salary. From initial employment on, salaries of agents vary from county to county depending on performance, percentage of state versus county contribution and many other factors, none of which are racial. Petitioners submitted inaccurate comparisons and statistics which failed to utilize the proper factors affecting all agents salaries. NCAES refuted and rebutted such evidence and showed it to be

inaccurate and lacking in probative weight, which is permissible under standards set by this Court in *Dothard v. Rawlinson*, 433 U.S. 331 (1977) and *Teamsters*, supra. The district court and court of appeals properly rejected such evidence and improper statistics.

II. The district court and the court of appeals correctly rejected claims that the selection of county extension chairmen was discriminatory. Petitioners, utilizing inappropriate comparisons with respect to the selection process of the county extension chairman, the highest county level position in NCAES, failed to prove their case. The district court, applying the appropriate allocation of proof set out in *Teamsters* and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), analyzed the statistical cases and individual claims against the evidence presented at trial. Petitioners failed to prove a discriminatory pattern or practice and each individual claim was found free from intentional discrimination. Petitioners assert the decision violates *Arizona Governing Board v. Norris*, 408 U.S. 1073 (1983). Once again, Petitioners avoid the facts.

NCAES and each of North Carolina's 100 counties are co-employers. NCAES recommends prospective employees to the County Commissioners. The decision must be one of joint acceptance. No responsibility is delegated to a third party. (Pet. App. 77a) *Norris* is not applicable to this case. The district court found no intentional discrimination on the part of NCAES or county commissioners thus the Title VII and Section 1981 claims were properly denied.

III. The district court and the fourth circuit correctly denied Petitioners claims that the NCAES 4-H and Homemaker Extension Club programs were operated in violation of Title VI and on a racially discriminatory basis. Out of thousands and thousands of voluntary black participants in the 4-H and Extension Home Economics programs since 1965 in North Carolina, not one came forward to testify that he or she had ever been subjected

to racial discrimination. The facts show no "freedom of choice" plan exists here. Both programs are voluntary and not mandatory public school attendance situations. NCAES affirmatively took action which eradicated pre-1965 segregation in 4-H and Extension Homemaker programs. Rather than withdraw support from one-race clubs which had not discriminated, NCAES elected to provide support without regard to race. The proof of the pudding is that out of the thousands of participants in those two programs none came forward to complain or assert any racial discrimination.

IV. The district court and the fourth circuit properly denied class certification in this case. The record clearly shows that class action was improper under Rule 23, Federal Rules of Civil Procedure because NCAES employees are not similarly situated and lack commonality in employment. Petitioners assert *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) was violated by both courts. *Eisen*, supra. dealt with two issues. The first was whether a class action determination was appealable under 28 U.S.C. § 1291 and the second was whether a district court, upon preliminary hearing on the merits, can require defendants to pay a part of the class notification costs. Neither issue is present in this case. The case was tried as a pattern or practice case in which the relief, had Petitioners won, would have been the same as if they had a proper class action, which they did not. Petitioners have pointed to no prejudice to their case by trying them as pattern or practice claims. The same relief is available either way. *General Telephone Company v. EEOC*, 446 U.S. 318 (1980). Even the elements of proving a prima facie case are the same in a pattern or practice case. *Cooper v. Federal Reserve Bank of Richmond*, 81 U.S. L.Ed.2d 718 (1984). The facts show that a class action is not appropriate here and the decisions do not conflict with decisions of this Court.

NCAES met the claims of petitioners and the United States head on in the trial of this case, responded to

each claim, and showed an organization free from racial discrimination. The decisions should be affirmed in all respects.

ARGUMENT

I. THE DENIAL OF THE SALARY CLAIMS WAS CORRECT AND SHOULD BE AFFIRMED

Petitioners claim error in the denial of salary claims. Before addressing petitioners salary arguments, we would like to recap the facts relating to NCAES and factors relating to salary affecting all county agents, regardless of race.

The organization of NCAES as described earlier in this brief is not contested. The existence of 100 separate counties as autonomous entities is not contested. That the financial contributions made by each 100 counties to its own extension program varies from county to county, is not contested. That the financial contribution from NCAES to the extension program of each individual county varies, is not contested. That the salaries paid to county level professionals varies from county to county is not contested. That when the State grants an across the board increase the amount received by county level agents varies according to the percentage of state/county contributions to the program, is not contested. That in any given year some counties may grant across the board raises to agents according to the percentage of that agent's salary paid by the county and other counties may not give any increase at all is not contested. That merit raises by the state affect salaries of individual agents based on their own performance is not contested. Only a small part of the overall funds is allocated to merit raises. That some counties may give merit salary increases in some years while others do not is not contested. That salaries paid to county extension chairmen vary widely between the county chairmen in 100 counties and that said salaries provide a maximum for county level staff in that county is not contested. In each of the 100 counties in North Carolina there exists a different level of salary due to the economic and agricultural pro-

grams of each county. Each of these separate factors creates salary differentials between agents and is not in any way attributable to an intentional statewide system of salary based upon race. (C.A. App. 212 "B", 213-14 "Y", 216 "Y", 220 "B", 221-222 "B", 223 "B", DX67-1-100, 275 "B", 281 "B", 282 "B", 286 "B", 287 "B".)

That each of the 100 counties has certain requirements which differ from other counties in connection with its extension program needs is not contested. Thus, a county whose chief agricultural commodities are livestock, poultry and truck farm crops will not require an agent whose educational training and background expertise is in tobacco or soybeans. A county whose major agricultural commodities are tobacco, soybeans and corn will not require an agent whose educational background and skills are in hog farming or cattle. It is uncontested that the needs of the individual counties dictate the needs and staff requirement of the extension program in each county and that those needs are different among the 100 counties. Thus, not every agent can be utilized in every county as their skills, experience and special qualifications vary with the county needs each meets. One cannot analyze the salary process of NCAES without understanding the uncontested factors that affect salaries of each agent. (C.A. App. 216 "Y", 221-222 "B", 224 "Y", 226 "Y", 275-278 "B", 280 "B", 281 "B") The petitioners do not dispute or seriously contest the facts which give rise to the differences between the needs of the counties, that such needs actually exist and that staffing is not uniform between counties because of the varying needs. The petitioners do not dispute or seriously contest the fact that these differences in county/state percentage of salary, merit raises, and other factors do in fact exist. They simply have elected to ignore them and proceed to analyze salary by utilizing an across the board average approach based on race, tenure, degree and title omitting the factors caused by the organization of NCAES and the differing needs and support between counties. The United States, in its brief, has acknowledged that county differ-

ences cause variances in salaries between counties. (U.S. Br., 30) The private petitioners continue to characterize them as "imaginary". The reason for this is that the facts show that any variances between agents, black or white, is not the result of any intentional racial discrimination.

A. NCAES agents, regardless of race, are not similarly situated nor performing the same jobs

The petitioners make inaccurate assertions that the lower court decisions permit NCAES to pay blacks less than whites in the same job and that the jobs of blacks and whites within the county level professional positions are the same or similarly situated.

Taking off from the inaccurate "less pay for same jobs" launching pad, petitioners equate the facts in this case with those of shift workers located in the same facility being paid different hourly rates based on sex in violation of the Equal Pay Act of 1963. After arguing that a violation of the Equal Pay Act is also a violation of Title VII and that the same principles should be applied to blacks being paid less than whites for the same jobs, the petitioners argue (1) that whites are paid more than blacks by virtue of a pre-Act and a post-Act discriminatory salary process, (2) that the NCAES has continued to engage in intentional salary discrimination in violation of Title VII and Section 1983, and (3) that their statistical evidence proved intentional discrimination, but was improperly rejected by the district court and court of appeals.

The NCAES employment system is unique, not uniform and because of real differences between positions, its professional level employees do not perform the same jobs nor are they similarly situated, be they black or white. As petitioners' contrary assertions are not correct, and NCAES contends the record proves they are not, their entire case must crumble and fail.

The fact that NCAES county level professionals are not doing the same jobs nor are they similarly situated in

terms of employment is shown by looking at the county by county differences and different factors affecting each agent's salary. These factors have been discussed in the Statement of Facts and at the beginning of this argument. (See pages 17-21 *infra*) Because of these differences each county program is unique and NCAES county level professionals work within each program at separate tasks dictated by the need of that particular county and do not do the same jobs or have the name responsibilities to be characterized as similar.

With respect to salaries, external non-discriminatory factors such as percentage increase in salary, degree, tenure, county percentage of pay, across the board increase, and merit proves that each professional, black or white, is not doing the same job nor are they similarly situated.

The quartile system is a clear reflection of the fact that each agent not only competes against himself or herself, but that the reason for this is that each agent's job requirements and work is different than others. If each agent were doing the "same job" or were "similarly situated" in terms of employment, the performance of each agent in a particular subject matter area, level or program would be measured against the other agents in that area, level or program. (Pet. App. 113a, n.31)

If the assertions made by petitioners that county employees have similar jobs and do the same jobs such that they fit nicely into the Equal Pay Act arguments and theories put forward to this Court, why are the highest ranking administrative jobs in the 100 county offices different in terms of salary? The record is undisputed that the pay of CECs vary from county to county from year to year by thousands of dollars. (J.A. 165-167) The answer is simple. CEC's do not do the same jobs either. The CEC's salary is also a "cap" on the salaries of agents on each staff, regardless of tenure, degrees, performance and areas of specialty. (DX-67-1-67-100)

The record clearly shows that just because an agent bears the title agricultural extension agent or 4-H agent,

his or her job is not the same nor are his or her employment conditions similar to an agent bearing the same title located within another county. Each works to fulfill the goals of his or her own plan of work dictated by the program needs of the county in which the agent is employed. (Pet. App. 114a) The district court acknowledged these facts in denying an employee class. (J.A. 78)

The U.S. now acknowledges that it is undisputed that salary levels vary from county to county and that such a factor should have been included as a variable in considering salary claims. (U.S.Br.30) Petitioners' premise that blacks receive less pay than whites for doing the same job in similarly situated settings must be disregarded.

B. The District Court and Court of Appeals correctly applied Teamsters, Hazelwood and Evans to the salary claims

Petitioners argue that the district court and court of appeals erroneously applied *Teamsters Hazelwood*, and *Evans* in connection with the pre-1965 salary differences between black and white NCAES county employees. Petitioners claim that the differences in salaries were the result of intentional salary discrimination and even if NCAES acted in a completely non-discriminatory manner in its salary process from 1965 forward any difference in salaries resulting from before the effective date of the Act in 1965 constituted a continuing violation of Title VII.

The court of appeals disagreed that this was the law. "A public employer who from this date forward (date of the Act) made all its employment decisions in a wholly non-discriminatory way did not violate Title VII even if it had maintained an all white work force by purposefully excluding Negroes." *Hazelwood School District v. United States*, 433 U.S. 99 (1977). This language in *Hazelwood* was relied upon by both courts in reaching their decision. The court of appeals held that any so-called "lingering effects" of pre-1965 salary differences was not actionable. (Pet. App. 389a)

While there can be no denial that prior to 1965, the NCAES was divided into a white and black branch, the record does not reveal that NCAES set any "wage scales" for blacks or whites. The jobs of the blacks, as were jobs of whites, were not similar before 1965 or after 1965 for the reasons previously stated and set out in the Statement of Facts.

The reason petitioners must make their intentional "wage scale" argument with respect to the pre-1965 situation is that this is a disparate treatment case and intent is required. A disparity in salary alone does not meet the burden of proof under Title VII disparate treatment. (U.S. Br., 20, n.18)

Thus, petitioners argue that any wage differences existing before 1965 were a result of intentional discrimination and that

> "black employees hired before 1965, because of their race, have received and continue to receive lower salaries than white employees who have been performing the same job for the same length of time." (U.S.Br.14)

C. The evidence does not reveal any Pre-Act intentionally set wage scales existed in NCAES

Petitioners argue that because Bazemore's base wages were established prior to 1965, NCAES could "indefinitely" to pay him and others like him lower salaries than wages paid to whites. (Pet. Br. 7) Bazemore's salary as an agent in 1971 was $13,342. Bazemore was making more money than the CECs in 47 counties in 1971. (DX-67-51, J.A. 165-167)

The district court found that the salaries of black agents in the pre-65 segregated system were lower than the salaries of white agents. The district court found that prior to the 1965 merger, the Negro Branch was headed by the "Negro state agent", R.E. Jones, a black male who was responsible for the budget and state plan of work of the Negro branch, including the hiring, promotion, dis-

cipline, discharge and *salary determination* of all black personnel. (Pet. App. 28a-29a) Neither petitioner called Jones as a witness, electing instead to introduce his deposition and an excerpt thereof. (GX-144.2) Jones testified that salary and salary increases recommend by him were almost automatically concurred in by NCAES. Jones did the hiring and set the starting salaries. Jones did not claim that his branch was discriminated against in budget allocations nor did Jones testify that separate wage scales were established or forced upon him for black agents in the pre-65 system. (GX-144.2)

Whatever salaries were established for agents hired by R.E. ones, the black administrator, they cannot be said to have been deliberately set on the basis of race by R.E. Jones and the record is devoid of any evidence to that effect. It flies in the face of reason that whatever Jones' decided in terms of salary or increases was set with deliberate intent to discriminate.

Another piece of evidence which petitioners contend show that average salaries differed because of intentional discrimination by NCAES is the Blalock Memorandum of 1971, GX-157. (J.A. 129) Petitioners' assertions on that point were not supported by findings of the district court. The reason for this is that Blalock was grappling with the average difference problem and not trying to maintain average differences at all. His memorandum refers to factors which explained average differences in salaries which were real, such as the competitive market. (J.A. 91)

Blalock testified about GX-157:

> ". . . I am simply stating that this is a reflection of what existed not only in North Carolina but throughout the country. At that point in time, there was a difference . . . not because of intentional discrimination on anybody's part but reflecting the fact that home economics agents could be hired at lower salary that white agents could . . . and I might add and I think it is a reflection of the fact that black agricul-

> tural agents could be hired and retained at a lower salary than white agricultural agents." (C.A.App. 995-999)

This explanation clearly shows that any resulting differences between blacks and whites, agricultural agents and home economics agents, were not the result of intentional racial discrimination. Blalock was trying to solve the disparity situation within the financial resources and the unique salary structure of NCAES.

> "That was a figure that I concluded that we ought to do to make adjustments in salaries that we needed to make at that time in response to the changing salary structures of our entry level salaries and in response to what we knew we were going to have to do as a result of the EEO Act." (C.A.App.900)

The record shows that NCAES did attempt to make adjustments within its budgetary parameters and visited each county separately to explain the situation and ask for support in the endeavor. (C.A. App. 900-903) Such efforts were made to reduce the average differences but due to the county by county salary differences and finding structure 1971, the averages were not eliminated. (Pet. App. 389a-90a) There is no evidence to support petitioners' claim that "the practice of fixing salaries or raises on the basis of race did not end in 1965" (Pet. Br. 8, 9).

Neither court below made a finding that the differences were based on intentionally set wage scales. The district court found that prior to the merger in 1965 the salaries of "professionals in the black branch on the average were less than those of their counterparts in the white branch". The Court also found that the disparity was recognized and steps taken to begin its elimination. (C.A. App. 120a-121a)

The district court made a *separate finding* with respect to the petitioners' claims that NCAES has failed to correct past effects of past discrimination. No appeal was taken from this finding. The district court stated:

> "The allegation is that defendants have failed and refused 'to take appropriate action to correct the present effects of ast racially discriminatory policies and practices.' Here again the allegation involves the assumption that there has been discrimination in the past the effects of which continue, a thesis staunchly denied by defendants . . . A violation by the defendant of any duty, statutory or otherwise, 'to take appropriate action to correct the present effects of past racially discriminatory policies and practices' has not been established." (Pet. App. 158a-163a)

The court of appeals acknowledged that salary disparities which had existed between the two branches were not immediately eliminated, but that by 1972 when Title VII became applicable to NCAES, that NCAES had "already been operating on a nondiscriminatory basis for about 6 years" and that since the merger in 1965, the NCAES had set a minimum starting salary for all new county level agents. (Pet. App. 360a) The court of appeals recognized that the disparities were reflected from the pre 1965 discriminatory structure of NCAES but did not find such salary disparities resulted from intentionally set wage scales. (Pet. App. 359a, 384a, 389a)

NCAES contends the differences in salaries then, as now, are due to the factors shown by the evidence to actually affect salaries between agents, not race.

It is undisputed that since 1965 there has been a uniform minimum starting salary for entrance level positions. (Pet. App. 384a). Thus the focus for petitioners claims is on pre 65 black agents who were "doomed" forever to being paid less than whites doing the same job. (Pet. Br. 24)

An examination of the pay data for agricultural extension agents who were employed as of the effective date of the Act in 1965 and on July 1, 1972 reveals that there were 42 black agricultural agents and 65 white agricultural agents in that category. Taking petitioners asser-

tions to their conclusion, the pre 1965 blacks should have been making less than any pre-65 white agents. Certainly no pre 65 white agents should have been making less because of the "wage scale" differences.

Appendix Exhibit A attached to this Brief is striking in contrast. Appendix Exhibit A is submitted with the admission that comparisons are meaningless without knowing each individual's job requirements and other factors affecting salary. It is presented to show only that what petitioners claim was occurring pre Act and post Act in salaries of pre 65 black agents did not occur.

D. The Evidence shows the salary process to be nondiscriminatory

Private petitioners assert the factors affecting the salary process recognized by the courts, but omitted in their statistical cases, are imaginary. The evidence shows otherwise.

It is not disputed that the financial ability of each of North Carolina's 100 counties to support the local extension program and salaries of agents varies considerably between lower income counties and higher income counties and the percentage of salary support varies with each county. (C.A. App. 281 "B").

After an agent is employed in his or her county position, the salary of that person is affected by a number of factors each year and are not imaginary. (C.A. App. 281, 639).

Counties provide across the board increases in salary ranging from 2 to 12%. Not every county provides an across the board increase each year and many give no increase at all for several years. An agent who receives 5,000 in county portion of salary and gets no county increase would stay at 5,000.00. But an employee in another county who also got 5,000 from the county and got an across the board of 10% would get 500.00 ahead in one year on county salary. (C.A. App. 639-640).

Conversely, in an across the board state increase the state portion of an agent's salary is also subject to the *same factors* as the county portion. (C.A. App. 223 "B"). That percentage of increase affects *only* the state/federal portion of the county professional's salary is automatic and non-discriminatory. (C.A. App. 647).

In a county where the state/federal contribution is 60% and the county is 40%, the effect will be different from a county in which the percentage is 44.7%/55.3%. (A. 2184).

NCAES does not take state salary money from those counties who are supporting the extension program to fund county raises in those counties who do not support the program. This factor causes a variance as well. (C.A. App. 648).

In addition to the variances which are created in county level professional personnel by virtue of the county/state percentage of funding, across the board or merit, the evidence shows other factors which affect the salary of each county agent.

Tenure is a factor which is undisputed as affecting salary. (C.A. App. 626, 281). Educational level position and degrees are factors. (C.A. App. 626, 281). The area of responsibility and size of the program of an agent are factors. (C.A. App. 626, 281). Another factor is the particular area of skill required by the particular county. In some instances it is necessary to pay more to get a particular skill which is needed. (C.A. App. 628, 629). Another factor which affects salaries is inflation. Inflation causes starting salaries to rise almost to the level of salaries paid to agents with 2 or 3 years tenure. Adjustments must be made to bring senior agents up to now agents salaries. (C.A. App. 629-30).

Job performance is also a factor which undisputedly affects merit pay raises of objects as seen by the quartling process. (C.A. App. 814-818, 1374-1375).

Quartiles are used because that agents' individual jobs are not comparable with other agents and an agent competes against his or her own performance goals. (Pet. App. 113a).

It is impossible to measure the performance of an HEA working to solve nutrition problems in Bertie County with the performance of an HEA working in clothing in Mecklenburg. Each HEA's responsibilities are different in that each is teaching in a different educational environment with different educational goals. If all HEA's screwed caps on bottles there would be a basis for comparison of agent to agent, but not so here.

Another factor ignored by petitioners is that the practical maximum salaries the county extension professionals can receive are affected in *each county* by the salary paid to the CEC. The salary paid the CEC sets the maximum for agents regardless of title, tenure, degree, performance, responsibility or program. (DX 67-1-67-100, 196, C.A. App. 632, 2210). The evidence shows that factors, in great measure, are completely *non-discretionary*, over which NCAES has no control the courts found were not abused and distorted. Both the district court and court of appeals recognized this fact. (Pet. App. 112a-113a, 383a).

E. Petitioners' statistical cases were properly rejected

At trial, the petitioners anchored their salary discrimination claims almost entirely on the statistics not related to these known factors. The petitioners' cases boil to the utilization of three "factors" of salary comparisons between blacks and whites with NCAES. These are race, tensure and degree. They utilized averages of salaries between blacks and whites, "comparisons" and multiple regression analysis in an attempt to prove discrimination in salary on the basis of race.

In view of the proven factors, which have an effect on salaries of NCAES county level employees, the lack of inclusion of those factors into the salary exhibits promul-

gated at trial by the plaintiffs showing "comparisons" of salaries failed to impress the Court. The district court held that the numbers just did not measure up to showing, explaining or proving plaintiffs' case. (Pet. App. 143a). The court of appeals likewise refused to be taken in. (C.A. App. 387a-388a).

The parties utilized two expert statisticians in connection with multiple regression analyses of salaries. Dr. Mann (Pls and US) and Dr. Gieshbecht (NCAES). The district court found the regression insufficient because they omitted major factors which clearly affected salary. (Pet. App. 132a-146a, 388a). In connection with a discussion of invalidity of the regression analysis, the district court referred to the case of *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981); 695 F.2d 134 (5th Cir. 1982), affirming findings of no discrimination previously affirmed. *Wilkins* is parallel to *Bazemore* with regard to statistics and the affect of the various factors which relate to salary, hiring and promotions: Chief Judge Gee stated:

> "Because of the significant role that statistics play in discrimination case and of their inherently slippery nature, it is imperative that they be used properly." 654 F.2d 395.

Here, the omission of valid factors proven to have an effect on salary prevented the regression from being an adequate tool.

Neither Dr. Mann nor Dr. Giesbrecht were qualified subject matter experts. Both declined to testify that they were qualified to know what subject matter variables such as job performance, county salary percentage, subject matter areas or size of subject matter responsibility should be, or not be, included in the models and the effect of such inclusion or omission except to say it would have an effect. (C.A. App. 412, 474, 475, 1523, 1524, 1530).

Neither statistician utilized in their models the factors reflecting size of county salary, size of state salary, merit increases, across the board increase, area of responsibility,

the size of the programs, job performance, skills, market demand, or prior experience. Both agreed that if a variable could explain salary more precisely, then they would want to see its affect on the model. (C.A. App. 450-456, 1463-1465).

The petitioners' regressions failed to separate the responsibilities of the CEC and the CEC's highest pay. (C.A. App. 446). The regressions in which county chairmen were omitted showed a reduction in the so-called race coefficient. (DX-277). The district court found the failure to exclude the CEC from the models was improper. (Pet. App. 139a).

The failure of the regressions to prove much of anything is further proved by the fact that the petitioners' regressions, using only race, degree and tenure as variables, accounted for only 53% of the total salary variation that existed among agents and chairmen on that date. 47% of the variation is not explained. (C.A. App. 396, 1464-1468, 2332, 1691-1716, Tr. 6056, 6065, 6082).

NCAES offered a series of scattergrams showing the relationship of salary to tenure between black and white agents for the years covered by the regressions. (C.A. App. 2326-2332). When plotted out in graph form, the salaries are displayed in a completely random distribution. Dr. Giesbrecht testified the distribution was random and that meant he saw "no pattern". (C.A. App. 1153-54).

In *Wilkins*, Judge Gee stated:

> "The fundamental flaw in plaintiffs' statistical evidence is that it fails to take into account the fact that a number of factors operate simultaneously to influence the amount of salary a faculty member receives." 654 F.2d 402.

The district court found the same fatal flaws in petitioners' cases. (Pet. App. 148a-150a).

The burden of establishing valid statistics was never met by petitioners and was thus unacceptable to both the

district court and the court of appeals. (Pet. App. 387a-391a).

F. The Petitioners failure to include known factors affecting salaries was deliberate and not the result of surprise

Although the U.S. now acknowledges in its brief that it is undisputed "in this case that salary level varied among the various counties" and that the court of appeals was correct that such a major variable affecting salary should have been accounted for in petitioners' case, the U.S. asserts that petitioners should be excused from having omitted it from the regression analyses because petitioners did not have any knowledge of its existence, along with other variables, until the "brink of trial" when those variables were purportedly first identified by NCAES. The U.S. now acknowledges that the salary of agents is affected by a "complex matrix" of salary decisions, including merit raises, cost of living increases and county to county variations in salary increases. (U.S. Br. 21, n.19, 30, n.30).

Petitioners knew of the complex matrix and myriad of factors and differences affecting individual employment in NCAES as early as 1975 and simply elected to disregard them in favor of an across the board average approach to this case which compared black average against white average and utilized regressions which used race, tenure and title. Petitioners left out performance, a major factor because they were challenging the quartile rankings for determining merit (performance) pay. (U.S. Br. 34, n.34).

The differences between counties and agents jobs were apparent to anyone who read the pre-1974 discovery. NCAES's Memorandum in opposition to *both* petitioners' motion for class certification filed January 23, 1975, stated:

> "As each county varies in size, population, needs and requirements, wealth and resources, the salaries

> of agents vary in size from county to county, together with the volume and extensiveness of services provided by county extension staffs. . . .
>
> . . . A review of salary differentials between agents and home economics agents of equal tenure vary from county to county. The specific factors peculiar to each county's needs and requirements play a role in such differentials . . ." (Def. Br. 1/23/75 p. 7-8)

This was written six (6) years before trial. The district court recognized these facts and denied class action because agents were not linked by similar job conditions or commonality. (J.A. 74-79). In 1981, petitioners took depositions again of NCAES' director and associate director. Following those, petitioners renewed the motion for class certification asserting across the board racial discrimination. Citing specific deposition testimony given in 1981, NCAES pointed out the factors affecting agent's individual employment and the lack of similarity in jobs and salaries.

> "Although salaries of assistant, associate and full agents and the county chairmen have minimums established which NCAES and each county must meet, salaries from county agent position to county agent position vary with each county above the minimum level . . .
>
> Salary levels for the same position as associate agent or for that matter, county chairman, differ from county to county. In fact there are some counties where agents make more than county chairmen in other counties. (Def. Mem. 7/27/81.8-9, J.A. 37)

NCAES listed 15 factors affecting salaries of agents, excluding across the board NCAES raises. After listing them, NCAES's stated that assertions by petitioners that they were discriminated against in salary without providing details including variables affecting salary would be insufficient to prove their assertions. (Memo. 9, 15).

It is evident that petitioners were aware of the differences between agents in work and salaries well prior

to trial and that petitioners had to knowingly and deliberately disregard them as they prepared their case in favor of meaningless averages and unreliable regressions which failed to explain or prove much of anything. (Pet. App. 379).

Neither the district court or court of appeals, who carefully took the time to review the evidence, were misled. Both courts refused to accept the comparisons and regressions as proving discrimination because they did not reflect the facts and found it "defied logic" to make comparisons of salaries between counties. (Pet. App. 387a-388a).

With the petitioners spurious across-the-board "wage scale", "surprse" and "imagination" arguments exposed, the correctness of the salary claims decisions is clear and the decisions should be affirmed as correct.

II. THE COUNTY CHAIRMAN SELECTION CLAIMS WERE PROPERLY REJECTED

The district court held that the "Claims of plaintiffs based on alleged racial discrimination by the Extension Service in the selection of county chairmen must fail." (Pet. App. 101a). This holding was affirmed unanimously by the circuit court. (Pet. App. 423a, 425a).

Petitioners contend that neither the district court nor the court of appeals gave proper weight or analysis to their statistical cases and inaccurately argue that the decision of the court of appeals is in conflict with *Arizona Governing Board v. Norris*, 403 U.S. 1073 (1983).

Petitioners have caused the CEC claims to be distorted because they now argue that discrimination had been proved and but for faulty analyses by both courts below, they would have won on this issue. (Pet. Br. 70-71).

Petitioners utilized two methods in attempting to prove their claims of racial discrimination in selection of County Extension Chairmen (CEC). The first was by the use of raw statistical data showing the numbers of whites versus

blacks from 1962/63 through 1981 and various comparisons stemming from that raw data. (J.A. 114-127). The second method was to challenge the individual CEC selections in which blacks applied but were not selected from 1970 to 1981 with a sprinkling of so-called "futility applicants" thrown in for added effect.

The district court, after hearing the evidence, found that in each instance where blacks applied but were not selected, there was no racial discrimination shown and that the NCAES had offered legitimate non-discriminatory reasons for each decision contested. As far as the so-called "futility applicants", the district court reviewed their reasons for not applying for vacant positions and found them not to be credible. (Pet. App. 94a, 95a, 100a, 101a, 227a-317a). Petitioners attempt to sweep these factual determinations under the rug. Findings based upon the evidence cannot be disregarded. *Pullman Standard v. Swint*, 456 U.S. 273 (1982). The district court's decision on individual claims shows why petitioners have chosen to reveal only the statistical side of their CEC claims.

Petitioners complaints about the failure of their statistical case are without merit. Petitioners disregarded the fact that the position of CEC is a position requiring special qualifications and numerical comparisons including race and tenure standing alone are meaningless.

The record is quite clear that the CEC position requires special qualifications, including leadership. (C.A. App. 275 "B"). The requirements for the CEC vary because the needs of the individual county vary. (C.A. App. 213 "Y") It is undisputed that each CEC must carry particular subject matter expertise, depending on the county where the CEC position is open. (C.A. App. 220 "B"). Thus not every agent with sufficient time, title and subject matter expertise is qualified to apply for any CEC position that becomes vacant. An agent with expertise in dairying is not going to fit where the need is for specialty in tobacco. Petitioners simply ig-

nored the facts in preparation and presentation of their statistical cases.

The "statistical" evidence presented clearly shows that all petitioners did was to compare black agents with white agents, by sheer numbers or by tenure and degree. They failed to show the special qualifications needed for the positions. Where special qualification are needed to fill particular jobs, such general comparisons lack probative value. *Hazelwood, supra* and *Teamsters, supra.*

Peteitioners also disregarded that the CEC position is one which, in addition to requiring particular skills to fit the county's needs, carries administrative and supervisory responsibilities. It is undisputed that the CEC is responsible for making hiring, salary, promotion, evaluation and staffing recommendations but is also responsible for carrying out an effective extension program. (C.A. App. 220 "B").

The district court recognized the position of CEC for what it is and correctly rejected the petitioners broad brush approach.

> "Plaintiffs' statistics are flawed in a further respect in that they include the assumption that every black full agent at the county level was qualified to fill the position of county chairman. There was an utter lack of proof to substantiate such a claim, and the persistent efforts of defendants through discovery and all the way through trial to require the plaintiffs to identify the qualified labor pool from which this position should be filled met with no success." (Pet. App. 89a-91a)

The district court also found the position required special qualifications and that the officials participating in the NCAES selection process were fairminded and acted without racial bias or prejudice. (Pet. App. 89-91a).

The district court properly extended the pre Act (1962/63) numbers game.

> "Thus, in order to be valid, a statistical analysis such as the one presented here must exclude those persons hired prior to [March 24, 1972, the effective date of Title VII for public employers]. To include pre-Act hires in the statistical analysis in this case would improperly weight the evidence and would tend to show present discrimination by an employer if it had discriminated prior to the effective date of the Act but had not discriminated after the Act took effect."
>
> *EEOC v. United Virginia Bank, supra,* at 150." (Pet. App. 85a-89a)

Petitioners also attacked the district and circuit courts' analyses of the 1972 county chairmanship selections as "unorthodox" and erroneous. The district court's analysis was not unorthodox and the district court found no discrimination in each individual claims of CEC contested by petitioners. (82a-87a, 226a-316a).

A review of the district court decision shows the district court, rather than placing great weight post-Act statistics analysis, considered that the figures only served to point up their inherent unreliability to prove an inference favorable to one side or the other. (Pet. App. 81a).

The bottom line is that the district court found that NCAES had rebutted the statistical case by showing inaccuracy of proof, had adopted valid and non-discriminatory procedures for selections of CECs and had followed the procedures fairly, without bias or prejudice. (Pet. App. 100a-101a).

The court of appeals unanimously affirmed the district court's finding of no discrimination in the CEC selection claims. In so doing, the court of appeals duly noted that the district court's analysis of post-Act decisions from 1972 was proper under *Hazelwood* and that the district court had found there was no finding of intentional discrimination against any individual who had sought the chairmanship. (Pet. App. 406a, 422a). The court of appeals found that the raw comparison statistics

proffered to establish a prima facie case did not "tell the full story" (Pet. App. 407a) and acknowledged that *Hazelwood* required employers be given the opportunity to approve that each of its post-Act employment decisions was made in a non-discriminatory way. (Pet. App. 407a-408a).

The court of appeals then addressed the CEC statistical analysis of the district court and stated:

> "While there may be some justification for the method of analysis by the district court, if we should consider that discrimination is against people and not applications, we think that, without deciding that either method is correct, a comparative analysis is worthwhile" (Pet. App. 412a).

The court of appeals then proceeded to focus on the recommendations made by NCAES instead of on the overall results. The result of such analyses led the court of appeals to find that the applications of blacks were approved at the same rates as whites, that raw statistics were completely refuted and even if the Extension Service had a burden to prove its decision free from discrimination it had done so. (Pet. App. 412a-423a).

Thus, both courts looking at the data in more than one method of analysis, came to the conclusion that petitioners statistics failed, but that in any event the NCAES had proved its CEC process and decisions were free from racial discrimination.

Having lost resoundingly at trial and on appeal, petitioners have now turned to arguments which infer the district court found a prima facie case of discrimination and that the error was in the determination of who was responsible for that discrimination. (Pet. Br. 70-71).

Petitioners assert that the court of appeals' analyses resulted in a decision to the effect that NCAES could delegate its final decision to the county commissioners and thus not be liable for their racial discrimination in selection. This is based on the incorrect assumption that there was proven discrimination in the actions of the

county commissioners in each selections challenged and disregards the fact that the district court examined each individual instance and found no evidence on racial discrimination in the selection by anyone. Yet, petitioners represent to this Court:

> "If, as actually occurred, the counties invariably preferred that NCAES hire only white chairmen, the fourth circuit held that NCAES had no legal responsibility for the result." (Pet. Br. 74)

This misleading statement launches petitioners' sidetrack argument that this case was just like *Arizona Governing Board v. Norris*, 403 U.S. 1073 (1983). *Norris*, was decided because the facts showed that there was a violation of Title VII with respect to a sex based retirement plan administered by a third party. The underlying situation in *Norris* that the complained of plan was in fact sexually discriminatory was not at issue. Here, the facts and evidence found by the district court showed no discrimination. (Pet. App. 82a-87a-226a-316a).

The analysis of applications and recommendations by the court of appeals differed from the district court's in that it looked at recommendations by NCAES on which to apply its statistical analysis and in so doing found no discriminatory pattern. However, neither did the court of appeals find discrimination by the county commissioners en route to that conclusion. Nor did the court of appeals hold that the NCAES was not responsible for the decisions made in the CEC process. The court of appeals observed that "The Extension Service is not separately responsible for the appointment to fill the vacancy, but it is separately responsible for the recommendation of one or more of the applicants." (Pet. App. 412a-413a).

The petitioners' arguments that the decision violates *Norris, supra*, must be disregarded.

The U.S. properly realizes that *Norris* has no application or relevance in this case. (U.S. Br. 35-36). The

U.S., however, complains about the analyses of the "statistical" case with respect to the applicant flow and recommendations by the court of appeals. However, the U.S., like the petitioners totally glosses over the fact that no discrimination in any selection was found and that notwithstanding whether a prima facie statistical case was made on the basis of raw data, it was completely refuted. (Pet. App. 422a-423a). The decisions of both the district court and court of appeals should be affirmed.

III. NCAES' 4-H AND EXTENSION HOMEMAKER CLUBS ARE NON-DISCRIMINATORY AND IN COMPLIANCE WITH TITLE VI

NCAES, as do all other Extension Services, sponsors two voluntary participation community programs, 4-H and Extension Homemaker Clubs. Petitioners assert that the district court and panel majority incorrectly denied petitioners' claims with respect to an alleged affirmative duty on part of NCAES to force integrated membership in local Extension Homemaker Clubs and 4-H Clubs existing in racially mixed communities. Petitioners compare this to is a school case and utilize the catch phrase of "freedom of choice" plan to fit these voluntary programs into *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), which is inapplicable.

Extension Homemaker Clubs. Extension Homemaker Clubs are voluntary, volunteer groups formed in communities by adults and receive home economic and other advice and support from NCAES. It has been the policy that all extension homemaker clubs are to be organized without regard to race. NCAES agents encourage the formation of new clubs without regard to race. Announcements of this policy are published in the media. Despite this, clubs of one race exist and so do many clubs of both races (Pet. App. 165a).

There has been no evidence presented that since the adoption of this policy for extension homemaker clubs that one single black or white person has sought and been

denied membership on the basis of race in an extension homemaker club in North Carolina. (Pet. App. 166a-172a).

Indeed, *not one* of the thousands of members appeared at trial to testify of any racial discrimination in the Extension Homemaker Clubs or programs.

NCAES has created an integrated environment and the district found:

> "the evidence shows, and plaintiffs do not questions that for all phases of club activity above the community club level, all extension staff and volunteer leaders, all county wide, district and state meeting and training sessions are fully integrated." (Pet. App. 168a-169a; FN 53)

4-H and Youth Program. The 4-H and Youth Program is designed to develop good citizenship, character and to teach youth useful and practical skills. North Carolina ranks 7th in the United States in terms of black youth participation in 4-H. (Tr. 5107). 4-H is a voluntary program not a mandatory public school system. It is significant that from 1972 to 1980 participation by black youth rose to 30,243, while black volunteer leadership increased from 2,665 in 1972 to 4,022 in 1980. (DX 227).

Membership in 4-H is not static. It is open to youth 9 to 19 and membership is constantly changing. About ⅓ of the units are reorganized each year and consequently, the clubs are not static. (Tr. 5107) Out of the thousands of persons, black or white, who participated in 4-H from 1965 to time of trial, none came forward to testify that he or she had been discriminated against in connection with the 4-H program.

Except for the one incident involving a 4-H youth and volunteer leader, there has been no evidence presented of any person, black or white, being denied participation in or subject to discrimination in the 4-H program in North Carolina. 4-H is completely integrated in all activities beyond the community 4-H club level and has been for many years. (Pet. App. 167a-169a).

Black participation in 4-H has risen and not declined. This is conclusive proof that blacks participating in the 4-H programs in North Carolina do not consider their membershaip in the 4-H clubs "a badge of slavery" as petitioners previously argued.

Petitioners assert that NCAES failed to follow administrative "affirmative action" regulations. At trial Petitioners claimed "affirmative action" required all clubs of one race in a mixed community to merge with clubs of another race and if not the Extension Service would be required to withdraw services. (Pet. App. 166a-167a).

The district court found the 4-H and extension homemaker programs met the requirements of Title VI and were operated without discriminatory intent or purpose. (Pet. App. 170a-183a).

The district court also recognized that this was the sar situation as "freedom of choice" school cases such as *Green* and that this is not a "freedom of choice" case. (Pet. App. 174a).

The critical issue facing the district court was what does the law require NCAES to do with respect to the existence of one race volunteer clubs which exist in racially mixed communities when there is no evidence of discrimination? Petitioners contended NCAES should require these clubs to merge with clubs in the same community that are another race, and should those efforts fail, to withdraw NCAES's services from those clubs. (Padgett Tr. pp. 1392, 2286; Reibman Tr. pp. 3231-3234).

The question is threefold. First, does the mere existence of a community extension homemaker club or a community 4-H club with members of one race existing in a racially mixed community violate Title VI and equal protection secured by the 14th Amendment? Second, do the USDA guidelines and their interpretations of all reasonable efforts have the force of law so that they must be followed by NCAES? Third, does the policy advocated

by the plaintiffs that services should be withdrawn from clubs located in mixed communities who have not denied membership on the basis of race to anyone, but remain all of one race, violate Title VI? Neither court below had to reach this last question to decide the case. (C.A. App. 62).

NCAES contends that the district court was correct in finding that the mere existence of an extension homemaker or 4-H club of one race which exists in a mixed community does not violate Title VI since there has been no exclusion, discrimination or denial of the benefits of the program.

Petitioners argue NCAES violated Title VI because it allegedly did not follow USDA guidelines which interpreted Title VI and the regulations promulgated thereunder with respect to the requirement of "all reasonable efforts" to achieve integration of clubs which exists in racially mixed communities. (Pet. Br. 94-95). An examination of the USDA regulations promulgated under Title VI, 7 CFR 15.1, *et seq.*, shows an absence of any requirement that an extension service withdraw services from a recipient of a program who has not subjected another person to discrimination on the basis of race.

At trial the district court requested the Petitioners to furnish authority that the USDA guidelines and interpretations of those guidelines with respect to the "all reasonable efforts" provisions are mandatory and must be followed by NCAES. No such authority has yet been furnished or cited. The reason is simple. Guidelines and interpretations are not regulations and are not mandatory. *United States v. City of Chicago*, 573 F.2d 466, at 427 (7th Cir. 1978), *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979).

Despite this, the Petitioners argue that the USDA's "guidelines" are mandatory and a one race club existing in a mixed community would be subject to the withdrawal of NCAES services for remaining one race. The only rea-

son for the withdrawal of services in such instance would be on account of race of the members, black or white, which we contend violates Title VI. The evidence clearly shows NCAES has taken appropriate affirmative action in 4-H and Extension Homemaker programs.

IV. THE DENIAL OF CLASS CERTIFICATION WAS CORRECT

This action was initially filed as a class action seeking purported class wide relief pursuant to Rule 23, Federal Rules of Civil Procedure on behalf of 4 proposed classes and 1 class of defendants. The four classes of plaintiffs were (1) all black and Indian employees of NCAES from November 18, 1971 thereafter (2) all black and Indian persons receiving services from NCAES on November 18, 1971 and thereafter (3) all black and Indian members or potential members of NCAES 4-H Clubs on November 18, 1971 and thereafter and (4) all black and Indian members or potential members of NCAES Extension Homemaker Clubs on November 18, 1971 and thereafter. The proposed defendant class were all county commissioners in North Carolina in their official capacities on November 18, 1971 and thereafter. (C.A. App. 46)

Following discovery both petitioners filed motions seeking certification of all 5 classes in January, 1975. NCAES opposed the class certification motions. On October 9, 1979, the district court denied certification as to all proposed classes. (J.A. 74-79) After re-opening discovery in July, 1981, the private petitioners again moved for class certification by means of a motion to reconsider. NCAES opposed the motion. On July 28, 1981, the district court denied the motion again because of lack of commonality and similar situations. (J.A. 87) Private petitioners continued to press for class certification even though the action was proceeding as a pattern or practice action seeking relief as broad as any possible under Rule 23.

The case was tried as a pattern or practice case. The private petitioners post-trial submittals incorporated all

of the relief set out in the United States' post-trial proposed decree and sought identical relief. (Pets. Mem. and Proposed Conclusions of Law and Fact filed 2/8/82)

Because of the previous discussions concerning the organization of NCAES, the operation of the employment practices, 4-H and Homemaker Extension Clubs and Boards of County Commissioners it is not necessary to the facts which clearly show that no class certification was permissible under Rule 23. NCAES respectfully directs the Court's attention to the district court's decision and the Statement of Facts contained in this Brief as to why the employee class was correctly denied. It is clear that NCAES county personnel are not situated in similar across the board jobs. The hiring and salary from county to county varies and the actions of 100 autonomous and separate Boards of County Commissioners do not affect any class of blacks or whites. Blacks are scattered throughout the state, each holding different jobs and performing different responsibilities. The only commonality is race and that factor is insufficient for class certification. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982).

The petitioners do not seek class certification the class which purportedly consisted of all black recipients of services. As pointed out earlier, the claims of discrimination in services were denied as no evidence was presented to support any such claims.

With respect to classes 3 and 4, the 4-H and Extension Homemaker Clubs, the district court found that at trial no members of the purported class of plaintiffs appeared, that there was no evidence that any black female was ever denied membership in any club, was provided inferior services or discriminated against by NCAES in connection with home economics or extension homemaker clubs. Likewise, there was no member of the purported class of 4-H members who appeared at trial to testify nor was there any evidence that any black child had been denied

services or membership in a 4-H Club except for 1 instance which was immediately corrected. There was no evidence of any denial of membership or services or inferior services whatsoever. (C.A. App. 47-48)

The district court found that all that was present were "bare, conclusory allegations of the complaint" unsupported by any evidence and that such was insufficient to establish a class. (C.A. App. 47-48)

The court of appeals noted that:

> "the plaintiffs do not take exception either to the findings of fact of the district court or to its conclusion that the class should not have been certified on the basis relied upon by that court". (Pet. App. 370a-371a)

Since there was no evidence of discrimination in the first place, there was obviously no class to exist.

Petitioners still claim error in refusing to certify a class of defendants of all county Boards of Commissioners in 100 counties in North Carolina. The decision to deny class certification of this purported defendant class was correct. Boards of County Commissioners are independent autonomous entities. The actions of one are not binding on another. Just as local boards of education are independent, Boards of County Commissioners are likewise. Each board makes its own decisions. There was no evidence of any standardized practice among the 100 separate counties in the state and many counties had no black NCAES agents or populations which were miniscule. (Pet. App. 47a-48a)

This Court's decision affirming denial of class certification of 92 South Carolina independent school districts supports the decision. *United States v. State of South Carolina*, 434 U.S. 1026 (1979) as did *Paxman v. Campbell*, 612 F.2d 848 (en banc) (4th Cir. 1980) holding class certification of 130 Virginia Boards of Education inappropriate. Nothing further needs be said here. Denial of class certification was correct.

Petitioners, however, leave the facts out of their class action arguments to this Court and launch into misleading arguments to the effect that the class action decision literally stood *General Telephone* on its head. This argument is brought about because both the district court and the court of appeals correctly recognized that the case was tried hand in glove by petitioners as a pattern or practice action and that the relief available was the same as if a class had been certified. *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980).

The decision of the district court was characterized by petitioners as holding that class certification was never permissible in a Title VII action if the EEOC or United States had also filed a pattern or practice suit. (Pet. Br. 100) This characterization is inaccurate.

General Telephone permits the government to seek and obtain relief on behalf of a group of aggrieved individuals under Title VII without having to comply with the strictures of Rule 23. *General Telephone*, *supra*, 331.

General Telephone held that the government could seek relief as broad as possible without being tied down to Rule 23 regardless of the lack of typicality or commonality of claims between persons for whom relief was sought. Nowhere was the *General Telephone* rationale more welcomed than here where no class was found to be proper under Rule 23. (J.A. 73-79) Hre, rather than lose the clout of a class action, the pattern or practice action permitted petitioners all the relief they could have gotten if successful as a class. Because of this the district court determined correctly that under *General Telephone* class action certification is unnecessary and to *require* it is inappropriate in pattern or practice actions. This was because Rule 23 cannot be imposed to limit a pattern or practice claim nor can the failure to meet Rule 23 be a bar to a pattern or practice claim. A reading of the district court's decision on class action denial will clearly show *General Telephone* was not stood on its head. (Pet. App. 33a-47a)

Petitioners have failed to point out a single disadvantage which has accrued to them at trial by not receiving class certification. Had they won, the relief they requested was the same as that sought by the U.S. (Pet. App. 373a)

Finally, in a last ditch effort to further confuse the class question and direct attention from the fact that petitioners had all the relief available to them by virtue of the pattern or practice case and suffered no prejudice by the correct decision denying the classes, petitioners muddy the picture claiming the court of appeals decision conflicted with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). That decision has no application here. *Eisen* involved two issues whose relevance, if any, to this case is highly questionable. The first was whether or not the determination of class certification and requirements that defendants pay a part of the statutory notice requirement were "appealable" as a "final order" under 28 U.S.C. 1291 and the second was whether the district court's order directing defendants to pay part of the cost of notice after a hearing on the merits was in violation of Rule 23.

Any resemblance of *Eisen's* issues to the district court or court of appeals appears to be imaginary. The district court denied certification after discovery. The simple fact is that the petitioners proceeded with the U.S. hand in glove seeking identical relief at trial. When they lost, they claimed error in class certification but have shown no prejudice because of it and the facts show certification was inappropriate here.

CONCLUSION

For the reasons stated above, the decisions of the district court and court of appeals should be affirmed.

Respectfully submitted this — day of February, 1986.

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APPENDIX

EXHIBIT A—COMPARISON CHART

This exhibit compares salaries of black agricultural agents who were employed by NCAES on July 1, 1965 and as of July 1, 1972, were full agricultural agents with salaries of white agricultural agents who were employed by NCAES on July 1, 1965 and as of July 1, 1972 were full agricultural agents. The salaries compared were those of both groups on July 1, 1972. The only information provided is county and salary as of July 1, 1972. White agents are designated as "White". The comparison does not include performance or other factors affecting salary. There are 42 black agents in this group. There are 65 white agents. Asterisk by those, black or white, who later applied for and were appointed County Extension Chairmen.

SOURCE OF DATA: GX-56; GX-125; PX-2; JA. 114-126

LeRoy Johnson (1890 program)	$16,900.00	
William S. Lamm—Wayne	$15,458.00	WHITE* Became CEC
Thomas H. Godwin—Wayne	$15,361.00	WHITE* Became CEC
Charles M. Turner—Rockinham	$14,930.00	WHITE
Frank H. Baker—Wayne	$14,562.00	WHITE* Became CEC
T. D. Williamson—Rockingham	$14,486.00	
George McDaniel—Wayne	$14,239.00	
Franklin Greene—Rockingham	$14,027.00	WHITE
P. E. Bazemore—Union	$13,984.00*	Made more than 47 CEC's 1971
Glenn Gartner—Mecklenburg	$13,764.00	WHITE
Booker T. McNeil—Cumberland	$13,724.00*	Became CEC
William Wright—Nash	$13,418.00	
B. A. Hall—Guilford	$13,358.00	
Walter P. Farrior, Jr.—Wilson	$13,342.00	WHITE
William Mainous—Forsyth	$13,328.00	WHITE
S. N. Shelton—Orange	$13,302.00*	Became Program Leader
Cyrus A. Greene—Orange	$13,248.00	WHITE
Ray A. Kiser—Stanly	$13,032.00	WHITE
John D. Carroll—Guilford	$12,962.00	WHITE
Walter H. Bowers—Montgomery	$12,955.00	WHITE* Became CEC

Elbert E. Bishop—Cabarrus	$12,942.00	WHITE
Hernando Palmer—Johnston	$12,886.00	
Connie Jernigan—Cumberland	$12,785.00	WHITE* Became CEC
Howard L. Dalton—Guilford	$12,699.00	WHITE
Plese Corbett—Alamance	$12,684.00	
Wade W. Johnson—Davidson	$12,574.00	WHITE
David Waymer—Mecklenburg	$12,516.00	
Leonard Allen—Johnston	$12,432.00	WHITE
Judge A. Pierce—Rockingham	$12,414.00	WHITE
L. Baldwin—Franklin	$12,373.00	
Carol Baker—Union	$12,331.00	WHITE* Became CEC
Howard Stamey—Iredell	$12,294.00	WHITE
Lloyd Peace—Vance	$12,270.00	
Murray L. Godwin—Chowan	$12,254.00	WHITE
Kenneth E. Vaughan—Chatham	$12,230.00	WHITE
Donald W. Baker—Columbus	$12,225.00	WHITE* Became CEC
Horace L. Miller—McDowell	$12,218.00	WHITE* Became CEC
Earl Swann—Alamance	$12,200.00	
H. Eugene McCall—Haywood	$12,166.00	WHITE* Became CEC
Roderick Morris, Sr.—Bladen	$12,120.00	WHITE
Burton H. Taylor—Guilford	$12,093.00	WHITE
John Vanstory—Caldwell	$12,080.00	WHITE
Douglas Young—Randolph	$12,066.00	WHITE
George P. Upton, Jr.—Sampson	$12,048.00	WHITE
L. Cooper—Warren	$12,045.00*	Became CEC
Bobby Peek—Buncombe	$12,020.00	WHITE
Earl H. Smith—Henderson	$12,020.00	WHITE
M. C. Howell, Jr.—Union	$11,992.00	WHITE* Became CEC
Guyler F. Heath, Jr.—	$11,969.00	WHITE
James P. Bowles—Cabarrus	$11,950.00	WHITE
I. W. Murphee—Granville	$11,918.00	
Madison K. Dennis—Bladen	$11,916.00	WHITE* Became CEC
Robert M. Bowden—Vance	$11,882.00	WHITE
Richard A. Hayes—Greene	$11,867.00	WHITE
James West—Wake	$11,864.00*	Became Dist. Chairman
Walden M. Hearn—Pasquotank	$11,824.00	WHITE
LeRoy James—Pitt	$11,743.00*	Became CEC
Fletcher Barber—Jones	$11,753.00	
Dan E. Baucom—Onslow	$11,729.00	WHITE
Riddick Wilkins—Duplin	$11,684.00	
Hoover Royals—Anson	$11,597.00*	Became CEC
Woodrow C. Richardson—Watauga	$11,584.00—	WHITE

Jack Barnes—Stokes	$11,546.00	—WHITE
R. M. Edwards—Martin	$11,541.00	
Chester Bright—Beaufort	$11,492.00	
John Spaulding—Columbus	$11,449.00	
Snodie Wilson—Duplin	$11,422.00	WHITE
James C. Weaver—Montgomery	$11,360.00	WHITE
C. J. Cameron—Scotland	$11,352.00	WHITE
James C. Barber, Jr.—Gaston	$11,351.00	WHITE
Slater Lloyd—Granville	$11,346.00	
Rufus H. Rhyne—Stokes	$11,336.00	WHITE
Cleo Greene—Pender	$11,301.00	
William Strowd—Perquimans	$11,267.00	
Howard Waynick—Lincoln	$11,260.00	WHITE
John H. Wynne—Pender	$11,240.00	WHITE
O. G. Garland—Swain	$11,131.00	WHITE
Douglas W. Easton—Northampton	$11,139.00	WHITE
Pieter J. Westerbeek—Sampson	$11,017.00	WHITE
James Wright—Hertford	$10,985.00*	Became CEC
Stanley C. Corriher—Rowan	$10,979.00	WHITE
P. Williams—Pasquotank	$10,875.00	
Boyd C. Campbell—Henderson	$10,785.00	WHITE (14)
Samuel Little—Pender	$10,772.00	
Clifton Grimes—Gates	$10,766.00	
Avant Coleman—Wilson	$10,712.00	
K. T. Patterson—Alexander	$10,681.00	WHITE
Herbert Sproles—Gaston	$10,666.00	WHITE
Wiley Payton—Lenoir	$10,620.00	
Al. L. Smith, Jr.—Lincoln	$10,622.00	WHITE
Joseph Turner—Chatham	$10,585.00	
V. J. Goodmon—Richmond	$10,559.00	WHITE
Walter E. Garrand—Person	$10,555.00	WHITE
George Bowers—Cherokee	$10,406.00	WHITE
Raymond D. Phillips—Halifax	$10,394.00	WHITE
William Clayton—Johnston	$10,366.00	
Clarence Stockton—Robeson	$10,333.00	
Fred Belfield—Nash	$10,324.00	
Warren Barnes—Union	$10,228.00	
Thomas W. DuVall—Madison	$10,130.00	WHITE
Everett Hartzog—Yadkin	$10,106.00	WHITE
Chester Stocks—Lenoir	$ 9,892.00	
Ernest Short—Rowan	$ 9,879.00	
George Koonce—Warren	$ 9,873.00	
Robert F. Breland—Ashe	$ 9,717.00	WHITE
Bobby C. Armstrong—Tyrrell	$ 9,345.00	WHITE
Calvin Hargrove—Edgecombe	$ 9,246.00	

FOR ARGUMENT

Supreme Court, U.S.
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CLERK

No. 85-93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PRIVATE PETITIONERS

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TABLE OF CONTENTS

		Page
I.	The Application of Discriminatory Pre-Act Salary Scales	1
II.	Statistical Evidence of Discrimination	5
III.	NCAES' Legal Responsibility for Discrimination in the Selection of County Chairmen	21
IV.	Desegregation of the 4-H and Extension Homemaker Clubs	27
Conclusion		45

TABLE OF AUTHORITIES

Cases	Page
Arizona Governing Board v. Norris, 403 U.S. 1073 (1983)	23
Board of Visitors v. Norris, 404 U.S. 907 (1971)	40
Branti v. Finkel, 455 U.S. 507 (1980)	26
Carter v. Greene County, 396 U.S. 320 (1970)	25
Davis v. United States, 411 U.S. 233	26
Elrod v. Burns, 426 U.S. 347 (1976)	26
Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979)	40
Green v. School Board of New Kent County, 391 U.S. 430 (1968)	30,40
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	16,17
Hazelwood School District v. United States, 433 U.S. 299 (1977)	21

Page

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 11

Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) 25

Monroe v. Pape, 365 U.S. 167 (1961) 26

Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976) 42,43

Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) 26

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 91971) 40

Teamsters v. United States, 431 U.S. 324 (1976) 11,16

United States v. Logue, 344 F.2d 290 (5th Cir. 1955) 24

United States v. Manning, 205 F.Supp. 172 (W.D. La. 1962) 24

United States Postal Service v. Aikens, 460 U.S. 711 (1983) 9

Page

Statutes

Title VI, Civil Rights Act of 1964 35

Title VII, Civil Rights Act of 1964 ..... passim

Voting Rights Act of 1965 24

7 C.F.R. § 15.3(b)(6)(i) 39

I. THE APPLICATION OF DISCRIMINATORY PRE-ACT SALARY SCALES

Respondents apparently do not defend the fourth circuit's holding that both Title VII and the Fourteenth Amendment permit a public employer to apply a salary scale which was originally adopted for discriminatory purposes. Respondents argue only that the courts below erred in holding that NCAES had engaged in systematic salary discrimination prior to 1965. (R. Br. 30-34).

Respondents acknowledge that at least prior to 1965 it was the policy of NCAES to pay blacks lower salaries than whites doing the same work. Respondents insist that this policy was not the result of "intentional racial discrimination", but merely stemmed from a desire to save money. (R. Br. 32) Because there was less of a demand in "the competitive

market" for skilled blacks than for comparable whites, respondents urge, it was entirely reasonable to pay blacks a lower salary. (R. Br. 31) Respondents assert that the absence of invidious discrimination is established by the testimony of Director Blalock, who asserted that there were differences in the salaries of black and white employees "not because of intentional discrimination on anybody's part but reflecting ... the fact that black agricultural agents could be hired and retained at a lower salary than white agricultural agents." (R. Br. 31-32, quoting C.A. App. 995-99).

This argument misapprehends the nature of the statutory and constitutional prohibitions against intentional discrimination. Those prohibitions are not limited to cases in which an employer acts out of a malicious hatred of blacks,

women, or any other protected group. Title VII and the Fourteenth Amendment forbid a covered employer, in fixing the salary for a particular employee or position, from taking into account for any reason the race, sex or national origin of the individuals involved.[1] If, as Blalock acknowledged, it was the practice of NCAES to set a different salary for a particular employee based on his or her race, that practice constituted discrimination within the meaning of Title VII and the Fourteenth Amendment, regardless of whether the practice was adopted as a means to save money or as a means to stigmatize black workers.

---

[1] This case presents no issues regarding when an employer might take race or sex into account for benign reasons, such as to rectify past societal discrimination.

The "competitive market" defense proposed by respondents could, if accepted, largely nullify the statutory and consittutional prohibitions against discrimination. Title VII was adopted precisely because widespread discrimination had reduced the job opportunities generally open to, and the salaries ordinarily paid to, blacks, women and others. Such invidious practices not only affected the wages given to particular individuals, but forced down the salaries paid for positions generally or exclusively filled by members of one of the disfavored groups. It is inconceivable that Congress intended the existence of an industry wide practice of discrimination to become a legal justification for paying lower wages to members of the victimized group. Title VII was adopted to assure that the salary paid to an employee would

be a function of his or her skills and contributions, not a measure of the extent to which other employers had or still discriminated against other individuals of the same race or sex.

II. STATISTICAL EVIDENCE OF DISCRIMINATION

The Solicitor General urges this Court to adopt a very specific and rather complex set of standards to be applied in evaluating whether statistical evidence is sufficient to establish a prima facie case of discrimination. (U.S. Br. 22-28) We agree that the considerations discussed in the Solicitor's brief would be relevant to an evaluation of the weight to be accorded the statistical evidence in any given case, but urge the Court to eschew adoption of any rigid standard regarding what type of statistics are necessary to establish a prima facie case.

Because the exact contours of the Solicitor's proposed rule would be of considerable importance if adopted by the Court, we set forth below our understanding of the details of the Solicitor's proposal: (a) If a plaintiff establishes a simple statistical disparity, such as differences in the average salary paid to blacks and whites in the same job, that is sufficient to create a prima facie case only if the defendant offers no evidence regarding how it made the challenged salary or other decisions. (b) If a defendant establishes through the introduction of probative evidence[2] the nature of the "major" non-discriminatory factor

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[2] The Solicitor emphasizes on several occasions that the identity of these factors must be based on evidence (U.S. Br. 26-27), and that the factors must be those most relied on by the defendant at issue, not by employers generally. (U.S. Br. 27)

or factors influencing its decision, the plaintiffs' statistical evidence is to be treated as inadequate, and insufficient to establish a prima facie case, unless the plaintiff proves that those factors could not explain the disparity. In order to thus eviscerate a prima facie case, a defendant need not introduce any evidence, however, that those "major" factors had actually in any way contributed to the proven disparities. (c) A plaintiff is only obligated to include in his analysis "major" factors that the defendant has delineated with a reasonable degree of specificity; a general preference for "prior experience", for example, would not meet that requirement. (U.S. Br. 34) (d) Rule (b) does not apply to any factor which the defendant failed to identify as a "major" consideration at a point sufficiently prior to trial to permit

plaintiff to recalculate his statistics. (U.S. Br. 31 n.30) (e) A plaintiff need not include in his statistical analysis any factor he claims is tainted by discrimination, provided that he offers "some proof" of such taint. (U.S. Br. 27 n.24, 33 n.34) (f) If a defendant contends that a "non-major" factor accounted for a disparity, the defendant must prove, not only that it relied on that factor, but also that "inclusion of the factor would have eliminated the statistically significant effect for race". (U.S. Br. 26) (g) A plaintiff is not required, as part of his prima facie case, to consider a factor that is impossible to measure or quantify. (U.S. Br. 33 n.34, 34 n.35).

We agree that a court might well consider all these as well as other criteria in assessing the weight of sta-

tistical evidence offered by either party. But the Solicitor's elaborate 7-part test for determining whether statistics establish a prima facie case is precisely the sort of "rigid, mechanized or ritualistic" approach which this Court has condemned as a method for ascertaining whether a plaintiff has established a prima facie case. U.S. Postal Service v. Aikens, 460 U.S. 711, 715 (1983). Aikens made clear that, in evaluating a discrimination claim, courts should ordinarily focus on "the ultimate question of discrimination vel non", 460 U.S. at 714, rather than becoming embroiled in scholastic disputes about the precise quantum of evidence necessary to establish a prima facie case. It is certainly true, as the Solicitor suggests, that a statistical analysis which evaluates a larger number of relevant variables is more probative,

and deserves greater weight, than a less sophisticated analysis. Such differences, however, bear primarily on the weight of the evidence, not on its admissibility or its sufficiency to establish a prima facie case. Only rarely should a court hold that accurate statistically significant statistical evidence of a racial disparity in wages, hiring or promotions is insufficient even to require a defendant to offer a legitimate non-discriminatory explanation of that disparity.

Burdine does not, as the Solicitor suggests, insist that a plaintiff, as part of his prima facie case, demonstrate conclusively that a challenged act could possibly not be explained by any of "the most common nondiscriminatory reasons" for actions of the sort at issue. (U.S. Br. 22) In a hiring case, for example, a plaintiff need only establish that he was

qualified and that a vacancy existed. Burdine, 450 U.S. at 253 n.64. As the Court noted in Teamsters v. United States, 431 U.S. 324 (1976), such evidence addresses "the two most common legitimate reasons on which an employer might rely to reject a job applicant", 431 U.S. at 358 n.44 (emphasis added), but these clearly are not all of the "most common", "most important" or "major" reasons why a black applicant might be rejected. Many applicants, white as well as black, are also rejected because, although qualified, they are less skilled than other applicants; in some instances the vast majority of unsuccessful applicants may be rejected for that reason. Yet Burdine, Teamsters and McDonnell Douglas v. Green, 411 U.S. 792 (1973), all make clear that an unsuccessful applicant can establish a prima facie case of discrimination without

offering evidence of comparative qualifications, or proving that any other "common" explanation could not account for his rejection.

Any attempt to implement the Solicitor's 7-part rule would necessarily embroil the courts in arcane disputes about the meaning of the Solicitor's terminology. The Solicitor's proposal requires the courts to divide into two categories the types of non-discriminatory reasons on which an employer could rely in taking a disputed action.[3] One category is variously denoted as including the "major" (U.S. Br. 24, 26) or "most common" (U.S.

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[3] The Solicitor argues that this distinction was adopted by the court of appeals. (U.S. Br. 21). But the fourth circuit requires a plaintiff to include in his calculations "all measurable variables thought to have an effect on salary" (Pet. App. 391a)(emphasis added), regardless of whether or not those variables were "major".

Br. 22, 23, 24, 25) or "most important " (U.S. Br. 29) reasons for such actions; the other group is referred to by the Solicitor as simply "additional" reasons. (U.S. Br. 26) The Solicitor proposes that a plaintiff be required, as part of his prima facie case, to demonstrate the absence of any of the "major" legitimate reasons; the defendant, on the other hand, bears the burden of establishing the presence of one of the "additional" reasons. Whether a non-discriminatory factor is "major" or merely "additional" turns, the Solicitor explains, on the practices of the employer at issue. (U.S. Br. 27) Thus attendance might be a "major" factor in fixing salaries at one firm, but only an "additional" factor at another employer. The Solicitor offers no explanation of how a court is to decide whether to categorize a factor as "major"

rather than "additional". What is clear, however, is that under the Solicitor's rule the outcome of many Title VII cases would turn largely on which label was given to a particular factor.

We do not believe that the result of litigation such as this should be determined by a scholastic debate about whether a particular factor is "major" or merely "additional". The importance of any given factor will always be a question of degree, and the omission of any one variable may be of greater or lesser significance in light of the number and nature of the variables that were analyzed. Under most circumstances it will not be possible for either party to construct a statistical study that includes every factor that might account for a disputed employment practice. The number and nature of any variables that a

plaintiff or defendant may have omitted from its statistical analysis may detract, to a minor or at times substantial degree, from the weight to be accorded that evidence. A party seeking to attack the completeness of such an analysis ought ordinarily introduce probative evidence that inclusion of an omitted variable or variables would in fact have altered the result, rather than merely offering an argument that the omitted variable was "major" or "important".

The Solicitor's 7-part rule, even if it were workable, would make little sense in the context of a Title VII claim. Title VII prohibits practices with an unnecessary discriminatory effect, as well as practices adopted for a discriminatory purpose. Where a plaintiff establishes that an employer's decision-making process, such as its procedure for fixing

salaries, has an adverse effect on blacks, the employer must not only demonstrate the absence of any racial motive, but must also establish that the criteria used to set those salaries were justified by business necessity. An employer could not defend a salary discrimination claim, for example, merely by proving that among employees performing the same job it had chosen to pay a higher salary to those with high school degrees. Cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Evidence that an employer hires, promotes, or pays better salaries to a disproportionate number of whites ordinarily establishes, not only a prima facie case of disparate treatment under Teamsters, but also a prima facie case of disparate impact under Griggs. Teamsters v. United States, 431 U.S. 324, 335 n.15.

Where a plaintiff asserts both a disparate impact and a disparate treatment claim, no useful purpose would be served by requiring that statistical evidence of disparate treatment be refined to encompass all "major" or "important" factors. Although a plaintiff might fail to satisfy such a requirement, even relatively unsophisticated statistics, such as evidence that an employer hired a disproportioonately low number of black applicants, would establish a prima facie case under Griggs. The process of identifying the criteria that had caused that disparity, and that thus required a business necessity justification, clearly would not be assisted by distinctions between "major" and "additional" criteria, or by arbitrary presumptions regarding which criteria had caused which disparities.

Our disagreement with the Solicitor is a narrow albeit important one The considerations set forth in the government's brief would, we agree, be helpful in analyzing the weight of statistical evidence, and might usefully be applied in weighing statistical evidence offered by a defendant as well as that introduced by a plaintiff. We differ from the Solicitor only insofar as he suggests that the Court fashion from those considerations a set of rules defining what particular combination of variables must as a matter of law be included in a statistical analysis offered to establish a prima facie case of intentional discrimination. The infinite varieties of statistics, we urge, do not lend themselves to the framing or administration of such rigid rules, and adoption of this approach would divert Title VII litigation from an inquiry into the merits

of a plaintiff's claim into often arcane disputes about the nature of the statistical refinements that would be necessary to meet an increasingly complex standard for establishing a mere prima facie case.

We expressly endorse the Solicitor's recommendation that district judges be encouraged to make clear what types of statistical analyses they believe are important in a given case, and to afford the parties a reasonable opportunity to fashion and offer that evidence. (U.S. Br. 28) Where statistical evidence is relevant to a civil case, there will almost invariably be disputes and uncertainty as to how statistical analyses should be constructed, and as to which party bears the burden of doing so. Frequently the nature of the statistical analyses that would be appropriate in a particular case will not be apparent on

the face of the initial pleadings. A substantial amount of discovery will often be required before the trial court, or the parties, will have a sufficient command of the circumstances and nature of the claims to understand what types of statistical analyses would be relevant. Disputes about the manner in which such analyses should be conducted ought where possible be aired and resolved prior to trial, and, particularly where the analyses involved are complex and expensive, prior to the point at which the analyses themselves are prepared. Where a trial or appellate court concludes that the statistical evidence is sufficiently defective as to undermine the court's confidence in its ability to accurately resolve the merits of the claims, the interests of justice would best be served by reopening the record, rather than by directing judgment

against a party which reasonably failed to anticipate that it would be held responsible for offering such evidence. Cf. Hazelwood School District v. United States, 433 U.S. 299 (1977). In the instant case, however, that clearly is not necessary.

III. NCAES' LEGAL RESPONSIBILITY FOR DISCRIMINATION IN THE SELECTION OF COUNTY CHAIRMEN

The Solicitor General characterizes the selection of county chairmen as "a joint employment decision" of both NCAES and the counties. (U.S. Br. 35) The Solicitor urges that both parties to a "joint employment decision" are legally responsible for that decision under Title VII, and that there is thus no need to decide whether, in the absence of such a

"joint decision", Title VII might under some circumstances impose a form of "vicariou[s] liab[ility]". (U.S. Br. 36)

It is not clear whether the "joint decision" doctrine espoused by the Solicitor differs from the position set forth in our principal brief regarding the delegation of governmental authority to third parties. In the instant case no NCAES official actually participated in any way in the final choice among two or more names referred to a county; where several applicants were approved by NCAES, only county employees made the choice amongst them. This relation was a "joint decision" only the sense that NCAES had a right, which it waived in advance, to participate in that choice. The right enjoyed by NCAES was indistinguishable from the inherent right of any employer to determine the

terms and conditions of employment. If, on the Solicitor's view, the original existence of such a right renders an employment decision delegated to a third party a "joint decision", that would be equally true regardless of whether the employer waived its right, as here, on an ad hoc basis, or waived that right for a specific period of time, as occurred in Arizona Governing Board vs. Norris, 403 U.S. 1073 (1983).

The Solicitor may be urging, however, that the Fourteenth Amendment and Title VII permit intentional racial discrimination in the administration of governmental activities so long as the person who exercises discriminatory authority over those activities is not himself a paid employee of the state. Adoption of such a rule would give legitimacy to what was long one of the

most common segregationist tactics in the nation. For decades states sought to avoid applications of the Equal Protection Clause by delegating key decisions to private citizens, and the federal courts responded by resolutely declaring such schemes unconstitutional. Alabama and Louisiana, for example, at one time required prospective voters, as a condition of registration, to be "vouched for" or "identified" by a person who was already registered; that practice was declared unconstitutional when it became apparent that existing voters would not vouch for or identify blacks.[4] The University of Mississippi delegated to alumni control over the university's

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[4] United States v. Logue, 344 F.2d 290 (5th Cir. 1955); United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962). These practices were forbidden by §4(c) of the 1965 Voting Rights Act.

admission decisions, requiring all applicants to obtain a letter of recommendation from at least one alumnus; when none of the alumni would endorse James Meredith's application, the fifth circuit held that the state could not constitutionally implement the discriminatory preferences of those alumni.[5] In Alabama responsibility for selecting prospective jurors was at one time effectively delegated to private citizens known as "key men", who in practice selected only whites; no member of this Court doubted that the state was constitutionally responsible for that invidious discrimination. Carter v. Greene County, 396 U.S. 320 (1970).[6] This Court

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[5] Meredith v. Fair, 298 F.2d 696, 701-02 (5th Cir. 1962).

[6] "Under a 'key man' system, jury commissioners ask persons who are thought to have wide contacts in the community to supply the names of prospective jurors."

has twice held that state employees may not be dismissed from non-policy making positions merely because of their political affiliations; in both instances the key decisions not to retain the Republican plaintiffs had been made by Democratic party officials, not by any state employee.[7] These decisions make clear that unconstitutional discrimination occurs whenever "the wrongdoer is clothed with the authority of state law", Monroe v. Pape, 365 U.S. 167, 184 (1961), regardless of whether or not that wrongdoer received a state salary or held any official state title.

Davis v. United States, 411 U.S. 233, 246 n.2 (1973)(Marshall, J., dissenting). See also Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

[7] Branti v. Finkel, 455 U.S. 507, 510 n.5 (1980); Elrod v. Burns, 426 U.S. 347, 351 (1976).

IV. DESEGREGATION OF THE 4-H AND EXTENSION HOMEMAKER CLUBS

In North Carolina today thousands of black children and homemakers belong to all-black state and federally-supported 4-H and extension homemaker clubs. In the case of the extension homemaker clubs, the segregation is virtually absolute; according to the most recent data, less than 50 black homemakers in the entire state belonged to a club with any white members. (GX 7) Similarly, witnesses from nine counties with substantial non-white populations testified that all or virtually all of the black 4-H club members in those counties were in all-black clubs.[8]

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[8] Tr. 1082 (Gates), 1526-38 (Union), 1638-9 (Wilson), 1739-42 (Granville), 1765-66 (Vance), 1967 (Halifax), 2446 (Northhampton), 2450-51 (Washington), 2556 (Pasquotank).

The Solicitor General asserts that this state of affairs is attributable "solely to decisions freely made by private actors". (U.S. Br. 48) According to the Solicitor, the black women and children of North Carolina have spontaneously decided to establish a system of voluntary and at times complete apartheid, preferring to avoid any association with white homemakers and children in connection with 4-H and extension homemaker activities; racial isolation exists in these federally funded activities, the Solicitor suggests, solely because blacks chose, often with complete unanimity, to have nothing to do with whites. The Solicitor does not explain why these black women and children, who may work, meet or play with whites in all other aspects of their lives, would be adamantly opposed to participating jointly with the same whites

in 4-H or extension homemaker activities. The Solicitor nonetheless urges the Court to respect those alleged segregationist preferences of black North Carolinians, and to avoid tampering with the NCAES system that fosters and facilitates such racial separation.

Nothing in the record, however, provides any support for the Solicitor's theory that black North Carolinians have any such segregationist preferences; not a single witness testified that black women or children preferred to avoid contacts with whites. Freedom of choice has failed, we urge, not because blacks have spurned participation in integrated activities, but because blacks have generally been denied any meaningful opportunity to choose such activities.

For over 20 years black women and children in North Carolina have faced the same dilemma as the students in Green v. School Board of New Kent County, 391 U.S. 430 (1968), with the same result. In July of 1965, when NCAES replaced its policy of mandatory segregation with a freedom of choice plan, there were no integrated 4-H or extension homemaker clubs to join in any community in the state. A black had only two options, to participate in the very all black club originally established by NCAES on a racial basis, or to join an all-white program as the first, only, and quite possibly unwelcome non-white member. For a 10-year old black farm boy who only wanted to learn how to grow corn, for black housewives who needed assistance getting by on meager income, the message of intolerance communicated by a club's all-white membership was as effective a

deterrent as the "Whites Only" signs of the past. The price of admission to an all-white club was the courage and determination of a Rosa Parks or a Linda Brown; for most black women and children in North Carolina that price proved too high. Little has changed since NCAES first adopted that freedom of choice plan. Today in hundreds of communities across the state, all of the NCAES sponsored clubs are still all-white or all-black, and black women and children remain understandably reluctant to shoulder the burden, so long shirked by the state, of desegregating that system.

(1) Both the district court and the court of appeals believed that Title VI and the Fourteenth Amendment only require NCAES to cease enforcing its pre-1965 segregation policy, and impose on NCAES no obligation to undo the continuing effects

of that unconstitutional and unlawful policy. The Solicitor General expressly disavows this narrow view of NCAES' obligations:

> It is not disputed that the Service engaged in ... deliberate segregation ... and thus "automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory ... system.'" Such remedial efforts are necessary "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" ... by eliminating the condition that violates the Constitution and the conditions that flow from such a violation.

(U.S. Br. 40) (Emphasis added). NCAES could not satisfy that obligation by "simply announc[ing] that it w[ould] henceforth conduct admissions without regard to race." (U.S. Br. 43) An agency such as NCAES must make

> diligent oversight and remedial efforts to ensure that [its] practices are not tainted by discrimination, and do not send a subtle discriminatory message, that its personnel are sensitized to the need

> to treat applicants and potential applicants in a wholly nondiscriminatory manner, that its present and future practices do not have the effect of impeding desegregation, and that it is made clear to all that any practices discouraging or diminishing racial mixing are truly a thing of the past.... Against the backdrop of recent blatant discrimination, affirmative recruitment activities will normally be an important part of this nondiscrimination effort....

(U.S. Br. 43-44.) Neither the Solicitor nor the respondents suggest that NCAES ever made any such efforts, or took any action whatever other than the adoption of the disputed freedom of choice plan.

The Solicitor recognizes two problems of particular importance that must be addressed by an agency such as NCAES. First, where a government program has been deliberately organized along racial lines, the responsible agency must take whatever steps are necessary to eliminate the pattern of racial separation brought about

by past government action. "To do otherwise would perpetuate the prior de jure segregation by leaving intact conditions that are directly attributable to the unconstitutional actions of state actors." (U.S. Br. 42). Both the constitution and Title VI guarantee to each person "an equal opportunity to participate in government activities free from ... racial separation attributable to state action." (Id, 43). The Solicitor also correctly acknowledges that "the truly free exercise of choice by private actors" will often require that a state do more than merely rescind its prohibition against black participation in an all-white club or school. (U.S. Br. 43). Less blatant practices may impede the process of desegregation, or "send a subtle discriminatory message" that will deter blacks from joining state programs or

transferring to schools from which they were previously excluded. (U.S. Br. 43). State practices that are far less extreme than formal legal exclusions can impair or deter the exercise of the rights protected by both Title VI and the constitution.

Having articulated these standards, however, the Solicitor summarily asserts that "the lower courts found that the respondents had fully cleansed the clubs of any such racially based activities and that racial imbalance is solely the product of unfettered private action." (U.S. Br. 44). As Judge Phillips emphasized in his dissenting opinion below, however, no such findings are contained in either of the lower court decisions in this case. Both the Fourth Circuit and the District Court appear to have assumed that the only relevant issue was whether NCAES still had a policy of segregating

the clubs on a racial basis, and the decisions below are limited to a holding that blacks are no longer rejected for membership because of their race. Neither opinion below contains any reference to either of the issues that the Solicitor correctly recognizes as critical -- whether the present composition of the clubs is a result, at least in part, of the racial basis on which those clubs were originally organized, and whether such lingering effects impede or deter blacks from joining clubs that were established and continue to operate on on all-white basis. (Pet. App. 165a-185a, 424a n. 128).[9]

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[9] The district court opinion, after an extended discussion of evidence that NCAES no longer forbids blacks to join white clubs, states:

> "No individual has been 'subjected' to segregation or separate treatment by the defendants. If any individual has become a member of a club com-

(2) The Solicitor's brief contains a number of passages which appear to assert that a state has no obligation whatever to disestablish a de jure system, and that a state can fully satisfy the requirements of the constitution and Title VI merely by rescinding the rules which created that de

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> posed only of members of his or her own race, it has been an entirely voluntary act without any force or coercion on the part of the Extension Service. Indeed, the Extension Service requires that each club formed certify that membership is open to all races."

(Pet. App. 172a). In the context in which it occurs, the second sentence clearly asserts only that no NCAES rule or practice forbids blacks from joining all white clubs; this passage does not purport to decide whether pressures short of "force or coercion" may be inhibiting or deterring blacks from joining all-white clubs, or whether the present degree of racial separation is causally related to the previous policy of de jure segregation. The respondents never claimed or sought to prove that black women or children preferred not to associate with whites; a finding that any such preferences existed would thus be clearly erroneous.

jure segregated system. The Solicitor first asserts, in a apparent reference to NCAES,

> Where a state has not assigned persons during ... the de jure period ... to a particular program, there is no state-controlled atttendance pattern, discriminatory or otherwise, to undo or withdraw. Thus ... a genuinely race-neutral policy will ... fully dismantle the old system.

(U.S. Br. 42-43) (Emphasis in original). Prior to 1965, however, as NCAES candidly concedes, club members were avowedly assigned on a racial basis; blacks were directed to join only all black clubs operated by the "Negro branch" and whites were ordered to join only all-white clubs overseen by the "white branch". (Pet. App. 27a). This deliberate systematic assignment of blacks and whites to the separate programs of the "Negro" and "white" branches, respectively, created a state mandated membership pattern that

fell along strictly racial lines. That pattern was every bit as real and enduring as the school attendance patterns created by the state's segregationist education practices.

The applicable Federal Regulations require NCAES to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. § 15.3(b)(6)(i) The Solicitor dismisses this regulation with the following somewhat cryptic comment.

> [W]here, as here, admissions are traditionally the product of private voluntary choice, an entity covered by Title VI has fulfilled this requirement to take affirmative action to overcome the effects of prior segregation in admissions when it has established a genuinely non-discriminatory system.

(U.S. Br. 38 n. 41). This passage appears to be a prediction that a bona fide freedom of choice plan will always succeed in eliminating "the effects of prior

segregation" in a case such as this. But as the Solicitor correctly notes elsewhere in his brief, whether freedom of choice or any other measure will prove sufficient to dissipate such effects is an intensely practical question, one which a court can resolve only by weighing the actual impact of a particular plan on the specific pre-existing de jure system at issue.

The Solicitor suggests that the decision in Green turned largely on the fact that freedom of choice represented a sharp departure from the traditional manner in which school authorities determined which students would attend which schools (U.S. Br. 46-50). But the Court in Green condemned the freedom of choice plan in that case, not because it was novel, but because it was ineffective. An equally ineffective freedom of choice plan was rejected on the same ground in

Board of Visitors v. Norris, 404 U.S. 907 (1971) aff'g Norris v. State Council of Higher Education, 327 F. Supp. 368 (E.D. Va.), even though its use in that case was not novel. See also Geier v. University of Tennessee, 597 F.2d 1056 (6th Cir. 1979). The use of a neighborhood school assignment policy, which is certainly a traditional assignment practice, was disapproved on grounds of ineffectiveness in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

The Solicitor's description of the NCAES freedom of choice plan as "traditional" is not entirely accurate. Prior to 1965 residents of North Carolina enjoyed no freedom to choose a club whose racial composition they preferred; whites were required to join all white clubs, and blacks were limited to all black clubs. Since 1965 there has been no freedom of

choice regarding 4-H and Extension Homemaker activities at the county or state level; following the adoption of Title VI NCAES merged previously all white and all black county and state activities into unitary integrated operations. Only at the community level, and only since 1965, have North Carolinians been afforded an opportunity to select a 4-H or extension homemaker program based on its racial composition.

The Solicitor urges, finally, that the circumstances of this case are analogous to the facts in Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976). The Solicitor characterizes the Pasadena school board as having merely adopted a "racially neutral student assignment plan" (U.S. Br. 45); in fact, however, the Pasadena plan required the race-conscious reassignment of students so

as to assure that no school in the district was more than 50% non-white. 427 U.S. at 428. It was only after the board had thus eliminated the racial identifiability of its schools that apparently unrelated population shifts began to increase the minority concentrations at several schools. Unlike the board in Pasadena, however, NCAES has never implemented or achieved "a racially neutral attendance pattern," 427 U.S. at 437, that might break the causal connection between past de jure segregation and present racial separation.

(3) We noted in our principal brief, as had Judge Phillips in his dissenting opinion, that the record in thic case presents substantial evidence that club members are intentionally recruited on a racial basis. (Pet. Br. 92-93, 95-96; Pet. App. 475a-79a). Neither court below

purported to decide whether such recruiting had in fact occurred; the district court's suggestion that white club leaders would "strong[ly] resis[t]" integration of the clubs raises at the least an inference that those whites are not voluntarily recruiting blacks for the numerous existing all-white clubs. (Pet. App. 184a.) As of 1980, over 97% of the individuals responsible for recruiting for the all-white club were themselves white. (GX 11) In this Court neither the Solicitor nor the respondents argue that racial discrimination in recruiting is either legal or constitutional, deny that such recruiting occurs, or suggest that the lower courts addressed this issue. The district court should be directed on remand to resolve this claim, and to grant whatever injunctive relief may be necessary to eliminate such discrimination.

CONCLUSION

For the above reasons the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P.E. BAZEMORE, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM C. FRIDAY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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21 pp

TABLE OF AUTHORITIES

Cases:	Page
Arizona Governing Committee v. *Norris*, 463 U.S. 1073	11, 12
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	10
Castaneda v. *Partide*, 430 U.S. 482	3
Columbus Board of Education v. *Pennick*, 443 U.S. 449	17
Corning Glass Works v. *Brennan*, 417 U.S. 188	5
County of Washington v. *Gunther*, 452 U.S. 161	9
General Building Contractors Ass'n v. *Pennsylvania*, 458 U.S. 375	10
Green v. *School Board*, 391 U.S. 430	16
Griggs v. *Duke Power Co.*, 401 U.S. 424	8
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324	5, 7
Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702	12
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	7
Swann v. *Board of Education*, 402 U.S. 1	17
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248	6, 7
United Air Lines, Inc. v. *Evans*, 431 U.S. 553	4
United States Postal Service Board of Governors v. Aikens, 460 U.S. 711	9

Constitution, statutes and regulation:	Page
U.S. Const. Amend. XIV (Equal Protection Clause)	13
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:	
§ 701(b), 42 U.S.C. 2000e(b)	12
§ 703(a)(1), 42 U.S.C. 2000e-2(a)(1)	8, 11
§ 703(a)(2), 42 U.S.C. 2000e-2(a)(2)	11
29 U.S.C. 206(d)(1)	9
7 C.F.R. 15.3(b)(6)(i)	18

Miscellaneous: Page

D. Baldus & J. Cole, *Statistical Proof of Discrimination* (1980) 6
Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702 (1980) 8
Gwartney, Asher, Haworth & Haworth, *Statistics, The Law and Title VII; An Economist's View*, 54 Notre Dame Law. 633 (1979) 8

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

In our opening brief, our primary argument was that the court of appeals erred in holding that black state employees did not establish a claim under Title VII by (a) demonstrating current salary disparities between themselves and similarly situated white employees, and (b) showing that these current disparities result from a state policy, implemented before 1965, of paying blacks less than whites.

The Service's response is mostly factual. Respondents appear to suggest (Br. 33-34 & App.)[1] that there were no pre-Act salary disparities between blacks and whites, and also to argue (Br. 30-34) that any such disparities that did exist were not intentional. They also contend (Br. 27-28) that all jobs in the Service are sufficiently different to invalidate any comparison between salaries of black and white employees to ascertain if salary disparities are racially based. None of these contentions has merit.

We also disagree with several points made by private petitioners. Private petitioners make the largely factual argument that the post-Act system of admissions to Extension Service related clubs has not been truly open and nondiscriminatory; they also contend that the Service is vicariously liable for discrimination by various counties in the selection of county chairmen.

1. Insofar as the Service suggests (Br. 33-34 & App.) that there were no pre-Act racially-based salary disparities, this is contrary to the concurrent findings of the courts below.[2] The district court found

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[1] "Br." refers to the brief for the respondents. "Br. App." refers to the appendix bound with that brief. "Pet. App." refers to the separately bound appendix filed with the petition in No. 85-93. "U.S. Pet." refers to the petition in No. 85-428. "U.S. Br." refers to the brief for the federal petitioners. "Pet. Br." refers to the brief filed by the private petitioners. "Am. Br." refers to the amicus curiae brief filed by the AFL-CIO. "C.A. App." refers to the 10-volume court of appeals appendix, 10 copies of which have been lodged with this Court.

[2] Moreover, the Service's comparison chart (Br. App. 1a-3a), listing 1972 salaries of pre-1965 hires, does not demonstrate that blacks were paid as much as comparable whites, as the chart does not account for such factors as tenure and education.

it "undisputed" that before the merger of the black and white branches in 1965, the Service paid black agents less than white ones (Pet. App. 120a), and the court of appeals adopted this finding (Pet. App. 359a). While it is true, as the Service points out (Br. 32), that neither court below found that the racial disparities were based on pre-Act intentionally set "wage scales," this is not dispositive of the question of intentional discrimination. A purposeful decision to pay black employees less than comparable white employees, whether based on wage scales or on individual case-by-case determinations, constitutes intentional discrimination.[3]

2. Nor does the Service's suggestion (Br. 31-32) that the competitive market was such that black agents could be hired and retained at lower salaries than white agents negate the finding of intentional discrimination. A purposeful decision to pay blacks lower salaries than whites because of their race violates Title VII, regardless of whether intentional discrimination in pay is more economical for the employer.

We argue simply that the continued intentional payment of discriminatory salaries to blacks consti-

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[3] The Service contends (Br. 30-31) that it based its pre-1965 salary determinations for black agents, at least in part, on recommendations made by the "Negro state agent" who headed the Service's "Negro Branch" before the 1965 merger. This Court has declined to "presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977). Moreover, regardless of the intent of the individual making salary recommendations for agents in the Negro Branch (within whatever budgetary restrictions may have been imposed on him by the Service), the Service was ultimately responsible for the salaries in the two branches.

tutes a continuing violation of Title VII (see U.S. Br. 18-20). If amici AFL-CIO intend to suggest that a racially neutral policy (dealing, for example, with promotions or incentive bonuses), consistently applied since the enactment of Title VII, constitutes a "present violation" of the Act, simply because policies previously followed placed blacks in a less advantageous position and they have failed to "catch up," we seriously disagree. Such an analysis would be directly contrary to the rule that Title VII imposes on the employer no responsibility to eliminate a practice which "gives present effect to a past act of discrimination." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977). For, if a nondiscriminatory failure to correct the continuing effects of pre-Act discrimination constituted a "present violation" of Title VII, then the employer who discriminated on the basis of sex before 1972 in *Evans* would have committed a "present violation" by refusing to alter the "victim's" seniority, and the employer in *Hazelwood* who discriminated in hiring before the Act necessarily would have been in "present violation" to the extent it had not remedied the pre-Act discrimination.[4]

Here, there has been a violation of Title VII because the employer has purposely continued his dis-

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[4] Contrary to the suggestion of the AFL-CIO (Am. Br. 13), we have not argued that continuation of a non-bona fide seniority system violates Title VII, in the absence of post-Act discrimination. All that we argued (U.S. Pet. 18) was that such a system adopted for discriminatory purposes prior to the Act is not entitled to protection under Section 703(h), because "an intentionally discriminatory pre-Act [seniority] system * * * affords no justification for current [employment] practices that have a race-based effect * * *." See also U.S. Br. 20. We do join the AFL-CIO in the view that the Court need not decide whether a discriminatorily adopted pre-Act seniority system necessarily violates Title VII.

criminatory system subsequent to the enactment of Title VII. With respect to salary, a victim of discrimination suffers with each check he receives, and the employer intentionally discriminates with each check he issues. It is the continuing intentional discrimination that inheres in the employer's salary payments that violates Title VII. Rather than simply failing to remedy the effect of a discrete pre-Act discriminatory action, the employer here continues its intentional discrimination on the basis of race (see U.S. Br. 18-20).[5]

3. The Service also contends (Br. 27-29) that no valid comparison of black and white agents' salaries is possible because agents are not similarly situated

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[5] The AFL-CIO incorrectly attributes to the federal petitioners the view "that pay discrimination under Title VII cannot be proved circumstantially" (Am. Br. 8-9 n.6). Our position is simply that "the plaintiff in [a] discriminatory treatment case under Title VII must establish not only * * * disparity in wages, but also the employer's intent to discriminate." U.S. Pet. 18 n.20. We do not understand the AFL-CIO or any other party or amicus to dispute the prerequisite of intent, which is compelled in the disparate treatment context by *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Nor do we suggest that this requisite intent cannot be proved by circumstantial evidence —just that it must be proved. This necessarily requires examination of the reasons for any pay disparity to determine whether there has been intentional discrimination subject to a timely challenge (see U.S. Pet. 18 n.20). The point is that, while the Equal Pay Act provides that an employer will be liable based solely on a sex-based pay disparity (see *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974)), Title VII holds liable for disparate treatment only employers who have intentionally discriminated. See note 9, *infra*. Thus, irrespective of how intent is proven, it remains true that "a current disparity in salaries, without more, cannot be the basis for this Title VII claim of discriminatory treatment" (U.S. Br. 20 n.18).

and do not perform identical jobs. Contrary to the Service's suggestion (Br. 29), the United States has not conceded and does not concede this point. To be sure, we acknowledged that county-by-county differences "should have been accounted for as part of petitioners' case in chief" (U.S. Br. 30). But we also argued that it was not necessary to include such differences as part of the regression analyses because they were explained by other evidence demonstrating that county-by-county differences were *not* the reason for salary disparities between black and white agents (U.S. Br. 30-31).[6]

Under these circumstances, petitioners carried their burden. The evidence demonstrated that statistical differences were explained neither by county-by-county differences nor job performance (see U.S. Br. 30-33), and that the regression analyses controlled for other pertinent variables; the evidence accordingly negated "the most common nondiscriminatory reasons" for the salary disparity. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). It is because the proof at trial established these elements that petitioners made out a

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[6] The Service argues that our regression analyses, "using only race, degree and tenure as variables, accounted for only 53% of the total salary variation that existed among agents and chairmen", apparently suggesting that this was because of inclusion of county chairmen in the data base (Br. 38). The Service is using a statistic known as "R^2", which determines the explanatory power of a regression analysis. In fact, the R^2 factor for the key regression analysis in this case—Dr. Giesbrecht's analysis including race, education, tenure, job level and quartile rank (job performance) as variables and *excluding* county chairmen—was even higher (66% rather than 53%) (C.A. App. 1500, 1713, 1716). This statistic indicates that the explanatory power of the critical regression analysis was high. Cf. D. Baldus & J. Cole, *Statistical Proof of Discrimination* 338-339 (1980).

case of disparate treatment. Hence, it is unnecessary to rely on private petitioners' argument (Pet. Br. 50-52) that a Title VII disparate treatment plaintiff carries his burden merely by showing that blacks as a class make less than whites with the same job title (see *ibid.*). Nevertheless, such a showing would be insufficient in light of *Burdine*'s dictate that plaintiffs must eliminate "the most common nondiscriminatory reasons" for the challenged action (450 U.S. at 254) in order to establish a prima facie case. Job title is only one nondiscriminatory criterion; it does not encompass performance, seniority, qualifications, or other usual nondiscriminatory selection factors.[7]

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[7] Petitioners state that presentation of a prima facie case "shifts to the defendant the burden of adducing evidence that the disparity [between black and white salaries] was *caused* by [a] * * * nondiscriminatory criterion" (Pet. Br. 53) (emphasis added)). Two qualifications should be added to this statement. First, while *Burdine* made clear that an employer against whom a prima facie case has been made is charged with the burden to " 'articulate some legitimate, nondiscriminatory reason' " for the action (450 U.S. at 253, citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)), it also held that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated * * * remains at all times with the plaintiff" (450 U.S. at 253 (citations omitted)). Second, if the plaintiff's proof has not accounted for factors that directly affect salary in a major way, the employer may defend by pointing out that the plaintiff's statistical evidence is not sufficient to give rise to a finding of discrimination (U.S. Br. 24-25, 33 n.34).

This allocation of proof applies to all disparate treatment cases, whether based on allegations of individual or pattern or practice discrimination. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 360-361 n.46 (1977) (employer's burden to rebut prima facie case of pattern or practice disparate treatment is to show that plaintiffs' proof is "inaccurate or insignificant * * * [or] to provide a

Here, petitioners employed adequate controls in their regression analyses [8] which, when considered in tandem with other evidence, negated the most common nondiscriminatory reasons for the challenged disparity. It is for this reason, not because some lesser showing is required to establish a prima facie case of disparate treatment, that the lower court's ruling on this point should be reversed.[9]

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nondiscriminatory explanation for the apparently discriminatory result"). In contrast, the requirement of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)—that an employer against whom a prima facie case of discrimination has been made has the burden of showing that a selection criterion is job-related—has no application where, as here, the allegations are of disparate treatment rather than disparate impact (contra Pet. Br. 67-68). Intent must be proven to make out a claim of disparate treatment under Section 703(a)(1) of Title VII.

[8] Although we have argued that a regression analysis need not include every conceivable variable, so long as the most common nondiscriminatory reasons for the disparity are negated by a plaintiff's case-in-chief, the inclusion of job title as the *only* independent variable would render the regression analysis of dubious evidentiary value, even if independent proof were offered with respect to other variables. The very value of multiple regression analysis lies in its assessment of the effects of the independent variables believed to influence the dependent variable (here, salary). See generally, Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705-706 (1980); see also Gwartney, Asher, Haworth & Haworth, *Statistics, The Law, and Title VII; An Economist's View*, 54 Notre Dame Law. 633, 654-659 (1979). Limitation of the independent variables to one thus would leave the analysis with little explanatory power.

[9] While a Title VII disparate treatment plaintiff must prove intentional discrimination under the *McDonnell-Douglas* standard, the Equal Pay Act establishes liability based on a mere disparity of pay between men and women. Although the Bennett Amendment incorporated in Title VII the Equal

4. The Service contends (Br. 32-33) that petitioners did not appeal, and therefore cannot now challenge, the district court's finding (Pet. App. 163a) that petitioners did not establish "[a] violation by the defendant of any duty, statutory or otherwise, 'to take appropriate action to correct the present effects of past racially discriminatory policies and practices'." The Service errs in suggesting that the district court found as a matter of fact that there was a lack of proof that the Service failed to correct the present effects of past discrimination. Indeed, the district court found the existence of pre-Act salary disparities "undisputed," and found that these disparities had not been fully eliminated by 1972 (Pet.

Pay Act's affirmative defenses with respect to sex discrimination, it did not alter Title VII's definition of violation and thus did not modify a Title VII plaintiff's prima facie case. See *County of Washington* v. *Gunther*, 452 U.S. 161, 178-179 (1981). In any event, private petitioners have oversimplified an Equal Pay Act plaintiff's burden, because the Act requires proof that disparity in pay is for "equal work"—work which "requires equal skill, effort and responsibility, and which [is] performed under similar working conditions." 29 U.S.C. 206(d)(1). Inherent in any such proof is a showing that the disparity was not caused by several common nondiscriminatory reasons, *e.g.*, differences in requisite skill, effort, responsibility, working conditions, etc. Moreover, in weighing the evidence at the close of a case, see *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 (1983), an Equal Pay Act plaintiff's burden is not significantly different from a Title VII plaintiff's burden insofar as overall proof of salary disparity is concerned. Because there is no liability where pay differences are due to a seniority or merit system or to "any other factor than sex" (*ibid.*), an Equal Pay Act plaintiff, like a Title VII plaintiff, effectively must demonstrate the absence of the more common legitimate non-sex-based explanations for pay differences.

App. 30a-31a, 120a-121a), and the court of appeals concurred in these findings (Pet. App. 359a-360a). But the court of appeals also reached the *legal* conclusion that such a failure on the part of the Service does not constitute a violation of Title VII. The United States appealed that ruling, and included it in its petition for certiorari.[10]

5. As we have argued (U.S. Br. 35), private petitioners' contention that the court of appeals should have held the Service vicariously liable for the counties' employment decisions relating to county chairmen (see, *e.g.*, Pet. Br. 70-86) is not before the Court, since the Service shared responsibility for such discriminatory decisions and is liable for its own discrimination. If the Court chooses to address the question, however, we submit that the Service may not be held vicariously liable for discriminatory actions by county officials. Title VII requires that covered employers not discriminate in their own employment practices; it does not make them "the guarantors of the workers' rights as against third parties who would infringe them." *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 396 (1982).

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[10] The private petitioners also argue that the continuation of an intentionally discriminatory pay system violates the Fourteenth Amendment (Pet. Br. 40-45). Since there is a violation of Title VII, however, it is unnecessary to consider the constitutional question. It is well established that "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. * * * Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Private petitioners attempt to distinguish *General Building Contractors* on the ground that Section 1981 (which was at issue in that case) requires a showing of intent, whereas Title VII also forbids employment practices which have the effect of discriminating on the basis of race (Br. 83). Such a distinction has no significance with respect to this case since, as we have seen, intent is a necessary element of a plaintiff's Title VII disparate *treatment* cause of action. But, more fundamentally, a Title VII violation requires some discriminatory action by the defendant, regardless of whether the case is based on disparate treatment or impact. An "unlawful employment practice" by an employer is required for the employer to be in violation of either Section 703 (a)(1) or (2) of Title VII. Thus, an employer violates Section 703(a)(1) only where it affirmatively "discriminate[s] against an[] individual with respect to his compensation, terms, conditions, or privileges of employment" based on race. Similarly, an employer violates subsection (2) only when it "limit[s], segregate[s] or classif[ies]" its employees based on race. There is no hint in the language or legislative history of the statute that an employer who does none of these things can violate Title VII because of the conduct of others.[11]

The Court's decision in *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), does not suggest a contrary result. In *Norris*, state employees

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[11] We do not understand private petitioners to argue that the act of delegating hiring decisions to the county officials is itself a discriminatory action within the meaning of Section 703(a)(1). To establish such a claim, a plaintiff would have to establish that the very act of delegation had a discriminatory purpose. In this case, petitioners have not attempted to make that showing.

were required by their employer to select a plan from one of several private annuity companies, all of which discriminated on the basis of sex. To be sure, the Court found a violation of Title VII, but not because a discriminatory decision was made by any or all of the annuity companies.[12] Rather, as private petitioners appear to concede (Br. 77 & n.46), the State violated Title VII by "creat[ing] a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State" (463 U.S. at 1089), and each of the companies selected by the State offered only discriminatory plans. Thus, it was the State that made an employment decision in *Norris* that violated Title VII, by limiting employees to plans that discriminated on the basis of sex. As we have seen, the Service similarly violated the Act because it cooperated with county officials in employment discrimination.[13] But the Service would not be responsible

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[12] Indeed, the Court in *Norris* (463 U.S. at 1086) reaffirmed its observation in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 717-718 (1978), that an employer would not violate Title VII by simply providing equal amounts for each employee to buy whatever benefit was available to him on the open market—even if the only annuity plans available offered lower benefits to women than to men (*Manhart*, 435 U.S. at 718). The only limit on the employer's authority noted in *Manhart* is that delegations cannot be to a "corporate shell" (*id.* at 718 n.33). There is no suggestion that the counties were "shells."

[13] Plaintiffs would have a cause of action against the counties based on their discriminatory hiring decisions, at least if the counties were shown to be "employers" or "agents" of the employer (see 42 U.S.C. 2000e(b)). Such a showing would probably not be difficult on the facts of this case, if the counties had been included in this lawsuit. Because Title VII will almost invariably provide a basis for redressing un-

for the employment decisions of discriminating third parties in the absence of its own discriminatory conduct.[14]

6. Private petitioners asked this Court to grant certiorari to determine whether retention of a "free choice" admissions program in 4-H and Extension Homemakers clubs that leaves some all-white and some all-blacks clubs fails as a matter of law to satisfy the state's affirmative duty to desegregate (see Pet. Br. i-ii, Question 3; *id.* at 45-49). In their merits brief, however, petitioners present an entirely different, fact-bound argument that there has been intentionally discriminatory recruitment of new club members since termination of the de jure system in 1965 (Pet. Br. 92-93, 95-96). Adopting the analysis first articulated by Judge Phillips in dissent below, private petitioners maintain that the courts below ignored evidence of such post-Act intentionally discriminatory recruitment because of the courts' mistaken view that only discrimination in actual admis-

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lawful discrimination by a covered employer or his agent, there is no need to read a "vicarious liability" cause of action into the statute.

[14] Since it is unnecessary to reach private petitioners' argument that Title VII makes the Service a guarantor of employees' rights against discriminatory treatment by third parties, it is *a fortiori* unnecessary to consider whether the Constitution places such burdens on an employer (see Pet. Br. 78-86). But, in any case, private petitioners do not explain why the Fourteenth Amendment would create a nondelegable duty to protect persons from discrimination by others; indeed the creation of such a duty is inconsistent with the state action limitation of the Equal Protection Clause. As with the Title VII issue, it is quite possible that private petitioners would have a constitutional claim against the Service to the extent that the Service joined in racial discrimination, but again there can be no vicarious liability.

sions, not recruitment, was prohibited by Title VI and the Constitution (Pet. Br. 93-96; Pet. App. 475a-481a). Intentionally discriminatory recruitment practices obviously violate statutory and constitutional requirements. But contrary to private petitioners' suggestion, nothing said by either court below in any way indicates that they misunderstood this basic principle. The record, however, is devoid of any evidence suggesting any discriminatory recruitment and, *a fortiori*, any evidence sufficient to overturn as clearly erroneous the concurrent findings of the courts below finding no discrimination in the Service's conduct of the clubs.

Both courts below found that defendants adhered to a policy of nondiscrimination with respect to the formation and operation of the clubs.[15] Indeed, plaintiffs presented no evidence concerning the *racial composition* of the clubs formed after 1965 (let alone of segregative conduct in their formation or membership policies), because, contrary to Judge Phillips' and private petitioners' suggestion, no party ever

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[15] Private petitioners rely on deposition testimony that the "makeup of local clubs" has been determined by a "local volunteer" (Pet. Br. 92). Contrary to petitioners' suggestion, the quoted testimony simply states the obvious fact that voluntary leaders were responsible for the admission and overall membership process in the clubs; it does not in any way indicate that such volunteers determine the "*racial* makeup" of these clubs (Jan. 30, 1973, Blalock Dep. 74). That testimony did not otherwise suggest that race was a recruitment or admissions criterion. The remaining cited transcript excerpts simply state the witness's view that the black and white communities would resist forced merger of clubs (Tr. 4996-4999, 5121-5122; J.A. 99). None of these statements indicates that the Service or community would resist voluntary integration, or that the Service in any way discouraged integration or excluded any person from recruitment or admission to clubs.

drew any distinction between clubs formed before or after the *de jure* era.[16]

It was obviously because of this complete absence of evidence, not any misconception concerning the scope or requirements of the Constitution or Title VI, that neither lower court used the specific word "recruitment" when it found that the "formation" and "services" of the clubs were nondiscriminatory, or specifically addressed the question of whether the

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[16] We note that the number of integrated 4-H Clubs grew nearly three-fold between 1972 and 1980 (586 to 1442) (C.A. App. 1807). While these seriously incomplete statistics do not tell us very much about the racial composition of clubs formed after the *de jure* period, neither these figures nor any others in the record support petitioners' assertion that "[s]ince 1965 a substantial number of new single race clubs have been organized in racially mixed communities" (Pet. Br. 92). If anything, these statistics indicate precisely the opposite: *i.e.*, that the newly formed clubs are generally integrated, while the older clubs remain substantially one-race. Of course, even this tentative inference is based on the speculative assumption that the 880 one-race clubs remaining in 1980 were, for the most part, among the 892 one-race clubs existing in 1972, and that the increased number of integrated clubs primarily resulted from formation of new clubs. There is no evidence in the record concerning whether the one-race clubs in 1972 are the same as the 1980 one-race clubs or any other evidence relating to which clubs were one-race and when they were formed. The uncertainty concerning these statistics is also greatly compounded by the fact that the clubs are extremely fluid in their membership and organization. For example, about one-third of all the 4-H Clubs are reorganized each year (Tr. 5107). Accordingly, it is not even clear what number, if any, of the clubs formed during the *de jure* period still exist today. Finally, the statistics on clubs relate to all 4-H Clubs (community clubs, project clubs and special interest clubs) while petitioners challenge only the membership of the community clubs (Tr. 4443).

respondents had engaged in segregative conduct after 1967.[17]

Thus, the sole remaining question is whether a state entity fulfills its affirmative desegregative duty where, as here, admissions are normally determined by voluntary choice, if it establishes a genuinely race-neutral admission system and refrains from segregative conduct. The private petitioners rely exclusively upon *Green* v. *School Board*, 391 U.S. 430 (1968) to argue that such a remedy is constitutionally inadequate. As we explained in our initial brief (U.S. Br. 40-50), *Green* stated no such rule.

To be sure, *Green* held that a public entity which has engaged in de jure racial segregation has an affirmative duty to desegregate and with that proposition we readily agree.

The question, however, is what types of activity are necessary to fulfill this duty. The duty, we submit, necessarily differs depending upon the degree of control the public entity normally exercises over the admission and attendance patterns of private participants. In all instances, the ultimate constitutional requirement is to take affirmative action to create a system that is free from any devices which subtly

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[17] See Pet. App. 181a, 424a n.128; J.A. 147-148. The district court also found that "[i]n working with clubs all agents work across racial lines" (Pet. App. 169a n.53). The United States and private petitioners introduced evidence at trial that the Service had assigned agents to clubs on a racial basis until 1974 (Tr. 1078-1079, 1994-1995). No finding of fact was presented to the district court on this subject, however, and it was presumably for this reason that the court did not specifically address this evidence in its opinion. There is no evidence suggesting that the Service has assigned agents on a racial basis since 1974.

exclude or separate the races. However, the degree of control dictates both the remedial action the governmental entity must undertake to undo the effects of past discrimination and the legitimacy of allowing private actors to determine where they will participate in the government program.

Where, as in public schools, the state traditionally determines if and where the private person will attend, it must engage in "remedial altering of attendance zones" to undo the effects of past discrimination by restoring the condition required by the Constitution, *i.e.*, "truly nondiscriminatory assignments." *Swann* v. *Board of Education*, 402 U.S. 1, 28 (1971). Moreover, if mandatory assignment is the norm, a conversion to a "free choice" scheme that predictably, if not designedly, results in greater segregation is impermissible because such a device only "serve[s] to perpetuate or reestablish the dual school system." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 460 (1978).

In contrast, where "free choice" is the norm, there are no compulsory discriminatory attendance patterns to redraw in order to undo the effects of past discrimination. Nor is the governmental actor constitutionally required to alter fundamentally the traditional scope and nature of its program by eliminating or restricting participants' free choice. When such private choice is the norm, continuation of such a regime is clearly not a device that fosters segregation and any racial imbalance that results is solely attributable to private actors.

Thus, properly understood, *Green* does not stand for a general proposition that private actors must be deprived of their traditionally unfettered choice unless racial balance results, it simply applies the

familiar rule that a non-unitary system may not engage in activities that foster segregation.[18]

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed in part, affirmed in part, and remanded.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

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[18] Thus, respondents have fully complied with the U.S.D.A. Title VI regulation requiring them to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. 15.3(b)(6)(i). For the reasons stated above and in our initial brief (*e.g.*, U.S. Br. 38-39 n.41), a covered entity has fully eliminated the effects of past discrimination in the voluntary context when it has engaged in affirmative action to ensure that its program is open to all on an equal basis and that it avoids subsequent segregative conduct. These regulations do not in any way contemplate, as private petitioners suggest, that covered entities are required to restrict the choice of participants through, for example, merger of clubs in order to achieve a particular racial mix.

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No. 85-93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P.E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE ON BEHALF OF NATIONAL COMMITTEE ON PAY EQUITY; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW); AMERICAN CIVIL LIBERTIES U ON (ACLU); AMERICAN NURSES' ASSOCIATION (ANA); ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF THE GREATER WASHINGTON, D.C. AREA; COALITION OF LABOR UNION WOMEN; COMPARABLE WORTH PROJECT; EQUAL RIGHTS ADVOCATES, INC.; FEDERALLY EMPLOYED WOMEN; LEAGUE OF WOMEN VOTERS EDUCATION FUND; MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION; 9 TO 5, THE NATIONAL ASSOCIATION OF WORKING WOMEN; NATIONAL FEDERATION OF FEDERAL EMPLOYEES; NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF); OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; WOMEN EMPLOYED; WOMEN'S LEGAL DEFENSE FUND; YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., NATIONAL BOARD

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF NATIONAL COMMITTEE ON PAY EQUITY; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW); AMERICAN CIVIL LIBERTIES UNION (ACLU); AMERICAN NURSES' ASSOCIATION (ANA); ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF THE GREATER WASHINGTON, D.C. AREA; COALITION OF LABOR UNION WOMEN; COMPARABLE WORTH PROJECT; EQUAL RIGHTS ADVOCATES, INC.; FEDERALLY EMPLOYED WOMEN; LEAGUE OF WOMEN VOTERS EDUCATION FUND; MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION; 9 TO 5, THE NATIONAL ASSOCIATION OF WORKING WOMEN; NATIONAL FEDERATION OF FEDERAL EMPLOYEES; NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF); OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; WOMEN EMPLOYED; WOMEN'S LEGAL DEFENSE FUND; YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., NATIONAL BOARD

The National Committee on Pay Equity; American Association of University Women (AAUW); American Civil Liberties Union (ACLU); American Nurses' Association (ANA); Asian Pacific American Bar Association of the Greater Washington, D.C. Area; Coalition of Labor Union Women; Comparable Worth Project; Equal Rights Advocates, Inc.; Federally Employed Women; League of Women Voters Education Fund; Mexican American Women's National Association; 9 to 5, The National Association of Working Women; National Federation of Federal Employees; NOW Legal Defense and Education Fund (NOW LDEF); Office and Professional Employees International Union, AFL-CIO, CLC; Service Employees International Union, AFL-CIO; Women Employed; Women's Legal Defense Fund; Young Women's Christian Association of the U.S.A., National Board, move pursuant to Rule 36.3 of the rules of this Court, for leave to file the attached brief *amicus curiae* in support of the position of petitioners in this case. Consent to the filing of this brief has been declined by the respondents.

INTEREST OF AMICI CURIAE

The National Committee on Pay Equity is the only national coalition of labor, civil rights and women's organizations dedicated exclusively to eliminating wage discrimination and achieving equitable pay for all workers.* The Committee seeks to examine and educate the public on the causes and roots of pay inequities between men and women, and whites and people of color.

Amici curiae believe that blacks continue to encounter pervasive pay discrimination in the workplace, including,

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* Statements describing each NCPE member organization which has signed on to the attached brief individually are set forth in the Appendix to the Brief.

as here, discrimination in pay for the *same* work as is performed by whites.** Equal pay for equal work, without regard to the sex or skin color of the worker, is a bedrock principle of workplace fairness. The legal requirements for proving illegal pay discrimination between workers on the same jobs are so well-established and widely agreed upon by the courts that *amici curiae* believed these issues finally resolved. The decision of the court below ignores or misinterprets long-established precedent in this Court and in the other courts of appeals, as well as in the fourth circuit itself. The result is to impose unprecedented and unwarranted requirements on plaintiffs asserting invidious race discrimination in pay by reason of unequal pay for equal work.

In the attached brief *amici curiae*, we argue that the courts below should have applied long-established precedent under the Equal Pay Act of 1963, 29 U.S.C. § 206 (d), to claims of racially discriminatory unequal pay for equal work in the case at bar. Such precedent requires the conclusion that the plaintiffs' evidence more than established a *prima facie* case of unlawful discrimination in pay; it also requires the conclusion that the employer's racially discriminatory pattern and practice of unequal pay for equal work is a continuing violation, not time-barred under this Court's holding in *United Airlines v. Evans*, 431 U.S. 533 (1977). We believe that this argu-

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** White males earn more than black males throughout the work force, and within occupational categories as well. In 1982, black males employed full-time year round earned an average of only 72¢ for every $1.02 earned by white males employed full-time year round. In 1980, white male professional and technical workers earned an average of $10,000 more annually than black male professional and technical workers; white male craft workers earned an average of $3,400 more annually than black male craft workers. Source: Current Population Reports, Series P-60, U.S. Census Bureau.

ment is different from that presented by the parties, or, to our knowledge, by other *amici curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE COURT BELOW APPLIED AN ERRONEOUS STANDARD FOR THE ESTABLISHMENT OF A PRIMA FACIE CASE OF PAY DISCRIMINATION; UNDER APPLICABLE EQUAL PAY ACT PRECEDENTS, PLAINTIFFS' INITIAL BURDEN IS ONLY TO SHOW THAT THE WORK IS EQUAL AND THE PAY UNEQUAL	6
II. UNEQUAL PAY FOR EQUAL WORK IS A CONTINUING VIOLATION OF TITLE VII; EVERY PAY CHECK WHICH INCORPORATES A DISCRIMINATORY PAY DISPARITY IS A NEW AND SEPARATELY ACTIONABLE ACT OF DISCRIMINATION	12
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971) 7
Arkansas Educ. Assn. v. Board of Education, 446 F.2d 763 (8th Cir. 1971) 8
Bartelt v. Berlitz School, 698 F.2d 1003 (9th Cir. 1983) 13
Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984) .. 3, 4, 8, 9, 11
Berry v. Bd. of Supervisors, L.S.U., 715 F.2d 971 (5th Cir. 1983) 13
Boyd v. Madison County Mut. Ins. Co., 653 F.2d 1173 (7th Cir. 1981), *cert. den.*, 454 U.S. 1146 (1982) 13
Brennan v. Owensboro-Daviess County Hospital, 523 F.2d 1013 (6th Cir. 1975), *cert. den.*, 425 U.S. 973 (1976) 11
Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974) 6
Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wisc. 1982) 9
Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984) 8, 15
Corbin v. Pan American World Airways, 432 F. Supp. 939 (N.D. Cal. 1977) 14
Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 5, 6, 11, 14, 15
County of Washington v. Gunther, 452 U.S. 161 (1981) 7, 10
DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978) 7
Dudley v. Textron, 386 F. Supp. 602 (E.D. Pa. 1975) 14
EEOC v. Central Kansas Med. Center, 705 F.2d 1270 (10th Cir. 1983) 11
EEOC v. Hickey-Mitchell Co., 372 F. Supp. 117 (E.D. Mo. 1973) 14
EEOC v. Inland Marine Industries, 729 F.2d 1229 (9th Cir. 1984) 8
EEOC v. McCarthy, 768 F.2d 1 (1st Cir. 1985) 12, 13

TABLE OF AUTHORITIES—Continued

	Page
EEOC v. Whitin Machine Works, 635 F.2d 1095 (4th Cir. 1980)	6, 10
Ende v. Bd. of Regents, 757 F.2d 176 (7th Cir. 1985)	7
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978)	4-5, 9
Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), *aff'd sub nom. County of Washington v. Gunther*, 452 U.S. 161 (1981)	7
Hall v. Ledex, 669 F.2d 397 (6th Cir. 1982)	13
Handy v. New Orleans Hilton Hotel, 532 F. Supp. 68 (E.D. La. 1982)	7
Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972)	7
Hazelwood School District v. United States, 433 U.S. 299 (1977)	4, 14
Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973)	16
Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970)	7, 11
Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972)	6
IUE v. Westinghouse, 631 F.2d 1094 (3d Cir. 1980), *cert. den.*, 452 U.S. 967 (1981)	14, 15
Jenkins v. Home Ins. Co., 635 F.2d 310 (4th Cir. 1980)	12, 13, 14
Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982)	7, 10, 11
Laffey v. Northwest Airlines, 567 F.2d 429 (D.C. Cir. 1976), *cert. den.*, 434 U.S. 1086 (1978)	6-7
Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983)	8
May Department Stores Co. v. Smith, 572 F.2d 1275 (8th Cir.), *cert. den.*, 439 U.S. 837 (1978)	16
McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)	5, 8, 9, 10
Members v. City of Bridgeport, 646 F.2d 55 (2d Cir.), *cert. den.*, 454 U.S. 295 (1981)	8

TABLE OF AUTHORITIES—Continued

Page

Morris v. Williams, 149 F.2d 703 (8th Cir. 1945).. 8
Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981) 7, 11
Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. den.*, 423 U.S. 865 (1975).. 7
Patterson v. Western Development Labs, 13 Fair Empl. Prac. Cas. (BNA) 772 (N.D. Cal. 1976).. 8
Pittman v. Hattiesburg School Dist., 644 F.2d 1071 (5th Cir. 1981) 7, 9
Satz v. ITT Financial Corp., 619 F.2d 738 (8th Cir. 1980) 13
Shulte v. Wilson Industries, 547 F.Supp. 324 (S.D. Tex. 1982) 7, 10
Shultz v. American Can Co., 424 F.2d 356 (8th Cir. 1970) 11
Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. den.*, 398 U.S. 905 (1970) 7, 11
Strecker v. Grand Forks Cty. Soc. Serv. Bd., 640 F.2d 96 (8th Cir. 1980) 7
Teamsters v. United States, 431 U.S. 324 (1977).. 12
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 4, 5, 8-9, 10, 14
Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982) 11
United Airlines v. Evans, 431 U.S. 533 (1977).. 4, 5, 13, 14
Uviedo v. Steves Sash & Door Co., 738 F.2d 1425 (5th Cir. 1984) 8
Wade v. Miss. Coop. Extension Service, 528 F.2d 508 (5th Cir. 1976) 15
Washington v. Kroger, 506 F. Supp. 1158 (W.D. Mo. 1981) 8
Wells v. Hutchinson, 499 F. Supp. 174 (E.D. Tex. 1980) 14, 15
White v. City of Suffolk, 460 F. Supp. 516 (E.D. Va. 1978) 14
Williams v. Anderson, 562 F.2d 1081 (8th Cir. 1977) 8

TABLE OF AUTHORITIES—Continued

Page

Wright v. Mo. Dept. of Consumer Affairs, 512 F. Supp. 729 (E.D. Mo. 1981) 7-8

Statutes and Other Authorities:

Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d 2
Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e ..... *passim*
Section 703(h), 42 U.S.C. § 2000e-2(h) 10
Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103 16
The Equal Pay Act of 1963, 29 U.S.C. § 206(d) ..... *passim*
Civil Rights Act of 1866, 42 U.S.C. § 1981 8
Civil Rights Act of 1871, 42 U.S.C. § 1983 8
United States Constitution, Amend. XIV 2, 4, 8
29 C.F.R. § 800.14 10
S. Rep. No. 92-415, 92d Cong., 2d Sess. (1972), 118 Cong. Rec. 1070 (Jan. 25, 1972), reprinted in *Legislative History of Equal Employment Opportunity Act of 1972*, Sen. Comm. on Labor and Public Welfare, 896 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-93

P.E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICI CURIAE ON BEHALF OF NATIONAL COMMITTEE ON PAY EQUITY; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW); AMERICAN CIVIL LIBERTIES UNION (ACLU); AMERICAN NURSES' ASSOCIATION (ANA); ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF THE GREATER WASHINGTON, D.C. AREA; COALITION OF LABOR UNION WOMEN; COMPARABLE WORTH PROJECT; EQUAL RIGHTS ADVOCATES, INC.; FEDERALLY EMPLOYED WOMEN; LEAGUE OF WOMEN VOTERS EDUCATION FUND; MEXICAN AMERICAN WOMEN'S NATIONAL ASSOCIATION; 9 TO 5, THE NATIONAL ASSOCIATION OF WORKING WOMEN; NATIONAL FEDERATION OF FEDERAL EMPLOYEES; NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF); OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; WOMEN EMPLOYED; WOMEN'S LEGAL DEFENSE FUND; YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE U.S.A., NATIONAL BOARD

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

STATEMENT OF THE CASE

This class action was commenced on November 18, 1971, in the United States District Court for the Eastern District of North Carolina, by black employees of the North Carolina Agricultural Extension Service (NCAES). The plaintiffs alleged racial discrimination, *inter alia*, in the payment of lower salaries to blacks than to whites for performance of the same work.[1] They alleged that this practice violated the Fourteenth Amendment to the United States Constitution, and Title VI and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, 2000e. In 1972, the United States of America intervened as a plaintiff in the action, advancing essentially the same claims as the individual plaintiffs.

After a ten-week trial beginning in December, 1981, the district court, in decisions issued on August 29, 1982 and September 17, 1982, dismissed all of the plaintiffs' claims. On appeal a divided panel, with Judge Phillips dissenting, affirmed the decision of the district court. Following the filing of a timely petition for rehearing, together with a suggestion for rehearing *en banc*, the court of appeals divided evenly on the petition, resulting in the denial of rehearing *en banc*.

The rulings of the courts below which *amici curiae* herein specifically address are the following:

1. The plaintiffs offered several types of evidence of racially motivated pay discrimination. This evidence included a statistical presentation of a pattern of pay dif-

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[1] *Amici curiae* herein treat only petitioners' pay discrimination claims.

ferentials disfavoring black NCAES employees performing the same work as whites, supplemented by multiple regression analyses which demonstrated statistically significant underpayment to blacks performing the same work as whites with the same education and seniority; and numerous specific examples of disparate pay between white and black professionals, with comparable levels of seniority and education, holding the same job positions in the same county offices at the same time. The courts below rejected this evidence as insufficient to make out even a *prima facie* case of racially motivated pay discrimination on either a pattern and practice or an individual basis.

The courts below held that, in the pattern and practice aspect of the case, the plaintiffs had failed to make a *prima facie* case because their multiple regression analyses (like that of the defendants', which used a similar methodology and reached similar conclusions) did not include a number of factors which might possibly explain the pay disparities. They also held that the plaintiffs had failed to make out a *prima facie* case of individual disparate treatment because they had not shown that their job qualifications and job performance "qualified" them for the higher pay. (751 F.2d at 670, 672). Judge Phillips dissented, arguing that "[i]t is hard to imagine more weighty evidence of knowing, intentional continuation of acknowledged discriminatory policies." (751 F.2d at 692-693).

2. Both the district court and the court of appeals concluded that, despite the merger of separate pre-1965 salary scales for blacks and whites, the pre-1965 pay differentials remained in effect, thus resulting in a continuing pattern of lower pay to currently employed blacks hired before 1965 than to white colleagues holding the same positions. (751 F.2d at 670-672). Indeed, NCAES officials were themselves fully aware of the continuing nature of this discrimination, as revealed by an official

internal memorandum, which conceded that the salaries for non-white men were lower. (751 F.2d at 690-691). Nevertheless, both courts held that the continued use of such differentials violated neither Title VII nor the Fourteenth Amendment. Judge Phillips dissented, declaring that the cases on which the majority relied, *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *United Airlines v. Evans*, 431 U.S. 533 (1977), do not allow employers to continue practices that now violate Title VII because at one time they did not. (751 F.2d at 670, 696).

SUMMARY OF ARGUMENT

I.

Where, as here, black Title VII plaintiffs are performing the same work as whites for lower pay, the well-established body of precedent developed under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), should apply. The Equal Pay Act of 1963 bans lower pay to women working on the same jobs as men, unless the pay differential is based on a factor other than sex. Title VII bans discrimination in pay on the basis of, *inter alia*, race or sex. Because of the close relationship between the Equal Pay Act and Title VII, and the long-acknowledged need to interpret the two statutes consistently, the courts have traditionally looked to Equal Pay Act precedent to resolve pay discrimination issues under Title VII, on behalf of blacks as well as women.

This Court has said time and again that the burden of establishing a *prima facie* case of disparate treatment is not difficult; a Title VII plaintiff is required only to show "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), quoting *Furnco Constr. Corp. v. Waters*, 438

U.S. 567, 576 (1978). Moreover, the test set forth for establishing a *prima facie* case in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), is not an inflexible rule. *McDonnell-Douglas*, 411 U.S. at 802 & n.13; *Burdine*, 450 U.S. at 253 & n.6.

Under the Equal Pay Act (and under Title VII, where sex discrimination is alleged by reason of unequal pay for equal work), plaintiffs establish a *prima facie* case by showing that the work is equal and the pay is unequal. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195-196 (1974). Plaintiffs are not required to make any other showing, such as that they are "qualified" to receive the higher pay, or to negative all the possible arguably legitimate factors which might account for the pay differentials. Virtually all of the courts of appeals, including the fourth circuit, have so held. The lower court's mechanistic application of the *McDonnell-Douglas* formula was clearly inappropriate, and contrary to well-established precedent. There can be no principled justification for imposing more onerous requirements on black plaintiffs than on women plaintiffs complaining of unequal pay for equal work, as did the court below.

II.

Under the Equal Pay Act, present pay disparities between men and women working in the same jobs are actionable, regardless of the date of the original decision to incorporate such discrimination into an employer's salary structure. Pay discrimination has always been considered a continuing violation, newly actionable with each new paycheck incorporating a discriminatory pay differential. Again, virtually all of the circuit courts, including the fourth circuit, have so held. Contrary to the lower courts' conclusion herein, *United Airlines v. Evans* is inapplicable; it applies only to single past acts of discrimination with present effect, rather than to presently continuing acts of discrimination of the type alleged by plaintiffs here.

ARGUMENT

I. THE COURT BELOW APPLIED AN ERRONEOUS STANDARD FOR THE ESTABLISHMENT OF A PRIMA FACIE CASE OF PAY DISCRIMINATION; UNDER APPLICABLE EQUAL PAY ACT PRECEDENTS, PLAINTIFF'S INITIAL BURDEN IS ONLY TO SHOW THAT THE WORK IS EQUAL AND THE PAY UNEQUAL.

In a sex-based unequal pay for equal work claim brought under the Equal Pay Act, the plaintiff's initial burden of proof is to show that the work is equal and the pay is unequal. *Corning Glass Works v. Brennan, supra*, 417 U.S. at 195-196; *EEOC v. Whitin Machine Works*, 635 F.2d 1095, 1097 (4th Cir. 1980); *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 493 (4th Cir. 1972). The same standards should be applied to the instant race-based claims of unequal pay for equal work. Where, as here, the identical positions are at issue,[2] and plaintiffs have shown racially significant pay disparities through multiple regression analyses, through showings of average pay discrepancies for groups of blacks in the same positions, and through one-on-one comparisons of white and black professionals in the same positions with comparable levels of seniority and education, the courts below were plainly wrong in refusing even to find that plaintiffs had established a *prima facie* case of racial discrimination in pay.

Although the Equal Pay Act is not as far-reaching as Title VII, both statutes serve the same fundamental purpose of remedying discrimination in compensation.[3] The

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[2] Where the positions under comparison are the same, they are equal within the meaning of the Equal Pay Act. See *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 900 (5th Cir. 1974).

[3] Female equal pay for equal work plaintiffs are not restricted to suing under the Equal Pay Act; they may file under both the Equal Pay Act and Title VII, or only under Title VII, if they so choose. See, e.g., *Laffey v. Northwest Airlines*, 567 F.2d 429, 445 (D.C. Cir.

two must therefore be construed in *pari materia*, and neither should be interpreted in a fashion that would undermine the other.[4] Because of the close relationship between the Equal Pay Act and Title VII, the lower courts have uniformly looked for guidance to decisions interpreting the Equal Pay Act, and have applied Equal Pay Act standards on burdens of proof in deciding sex-based equal pay claims asserted under Title VII.[5]

Numerous lower courts have also applied Equal Pay Act standards for establishing a *prima facie* case in race-based pay discrimination claims asserted under Title VII, finding no reason to distinguish between the legal standards applicable to sex-based and race-based equal pay for equal work claims.[6] Other courts, while not refer-

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1976), *cert. den.*, 434 U.S. 1086 (1978) (equal pay claim brought under both Title VII and the Equal Pay Act); *County of Washington v. Gunther*, 452 U.S. 161, 165 & n.3 (1981); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 & n.3 (9th Cir. 1982) (equal pay claims brought solely under Title VII).

[4] *Ende v. Bd. of Regents*, 757 F.2d 176, 183 (7th Cir. 1985); *Gunther v. County of Washington*, 602 F.2d 882, 891 & n.10 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 596 (8th Cir. 1978); *Laffey v. Northwest Airlines, supra*, 567 F.2d at 446; *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 170-171 (5th Cir.), *cert. den.*, 423 U.S. 865 (1975); *Hays v. Potlach Forests, Inc.*, 465 F.2d 1081, 1083 (8th Cir. 1972); *Ammons v. Zia Co.*, 448 F.2d 117, 119 (10th Cir. 1971); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. den.*, 398 U.S. 905 (1970); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 727 (5th Cir. 1970); *Schulte v. Wilson Industries*, 547 F.Supp. 324, 337 (S.D. Tex. 1982).

[5] See, e.g., *Kouba v. Allstate Insurance Co., supra*, 691 F.2d at 875; *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981); *Strecker v. Grand Forks Cty. Soc. Serv. Bd.*, 640 F.2d 96, 99 (8th Cir. 1980); *Orr v. Frank R. MacNeill & Son, Inc., supra*, 511 F.2d at 171; *Ammons v. Zia Co., supra*, 448 F.2d at 119.

[6] See e.g., *Pittman v. Hattiesburg School Dist.*, 644 F.2d 1071, 1074 (5th Cir. 1981); *Handy v. New Orleans Hilton Hotel*, 532 F.Supp. 68, 71-72 (E.D. La. 1982); *Wright v. Mo. Dept. of Con-*

ring specifically to Equal Pay Act precedent, have nevertheless required the same showing to establish a *prima facie* case under Title VII of racially discriminatory unequal pay for equal work—i.e., that the work is equal or the same, but the pay is lower.[7] These decisions are consistent with the many cases holding that racially based unequal pay for equal work violates not only Title VII, but also other civil rights statutes and where, as here, the employer is a unit of state or local government, the Fourteenth Amendment to the United States Constitution as well.[8]

The lower court's ruling (751 F.2d at 670) that the plaintiffs had to show more than equality of work and inequality of pay is based on a faulty reading of *McDonnell-Douglas v. Green, supra,* and *Texas Department*

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sumer Affairs, 512 F.Supp. 729, 736-737 (E.D. Mo. 1981); *Patterson v. Western Development Labs,* 13 Fair Empl. Prac. Cas. (BNA), 772, 776 (N.D. Cal. 1976).

[7] See *Carmichael v. Birmingham Saw Works,* 738 F.2d 1126, 1136 (11th Cir. 1984); *Liberles v. County of Cook,* 709 F.2d 1122, 1128-1129 (7th Cir. 1983); *Members v. City of Bridgeport,* 646 F.2d 55, 60-61 (2d Cir.), *cert. den.,* 454 U.S. 295 (1981); *Washington v. Kroger,* 506 F.Supp. 1158, 1170 (W.D. Mo. 1981); cf. *Uviedo v. Steves Sash & Door Co.,* 738 F.2d 1425, 1431 (5th Cir. 1984) (same showing required to establish *prima facie* case of national origin discrimination in pay.)

[8] See e.g., *EEOC v. Inland Marine Industries,* 729 F.2d 1229, 1233, n.7, 1234 (9th Cir. 1984) (showing that no black ever earned more than a white for the same work establishes *prima facie* case of intentional discrimination under 42 U.S.C. § 1981 as well as Title VII); *Williams v. Anderson,* 562 F.2d 1081, 1089-1091 (8th Cir. 1977) (systematic payment of lower salaries to blacks than to whites in similar positions establishes *prima facie* case of intentional discrimination under 42 U.S.C. § 1983); *Arkansas Educ. Assn. v. Board of Education,* 446 F.2d 763, 770 (8th Cir. 1971), quoting *Morris v. Williams,* 149 F.2d 703, 708-709 (8th Cir. 1945) (systematic practice of paying black teachers substantially less than white teachers for comparable services violates the Fourteenth Amendment.)

of Community Affairs v. Burdine, supra. Contrary to the lower court's view, those cases did not establish that "plaintiffs [in an unequal pay for equal work case] must show that they were qualified to be receiving a higher salary in order to shift the burden of production to the employer." 751 F.2d at 670. This Court has repeatedly stated that the *McDonnell-Douglas* formula is only one possible method for establishing a *prima facie* case. *McDonnell-Douglas*, 411 U.S. at 802 & n.13; *Burdine*, 450 U.S. at 253 & n.6.

In *Burdine*, the Court stressed that an important function of the *prima facie* case is to eliminate the most common non-discriminatory reasons for the employer's apparently unequal treatment of the plaintiff. 450 U.S. at 253-254; see also *Furnco Constr. Corp. v. Waters*, *supra*, 438 U.S. at 577. Requiring a showing that the plaintiff is qualified to perform the work makes sense in a refusal-to-hire case such as *McDonnell-Douglas*, because a lack of qualifications is one of the most common non-discriminatory reasons for rejecting an applicant for a vacant position. It does not make sense in an equal pay for equal work case, as presented here, because there is no question that the plaintiffs are qualified to perform the same work as their white counterparts; they are already performing it.

On the other hand, the most common reason that an employer pays different wages to a black and white employee or a male and a female employee is that they perform different work. See *Briggs v. City of Madison*, 536 F.Supp. 435, 444 (W.D. Wisc. 1982). A showing of performance of the same work, along with unequal pay, thus serves to raise an inference of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible facts." *Furnco*, 438 U.S. at 577; see also *Pittman v. Hattiesburg School Dist.*, *supra*, 644 F.2d at 1074 (5th Cir. 1981).

The additional test imposed by the court below—"lack of qualification to be receiving a higher salary"—is unworkably vague as well as contrary to the great weight of precedent. Numerous reasons not within a plaintiff's knowledge may account for his "lack of qualification" to receive the same pay as his white counterpart performing the same work. For example, he may not be "qualified" for higher pay because of the employer's application of a bona fide seniority system, a merit system, or a system which measures earnings by quantity or quality of production.[9] Like the applicant who is not in a position to know why he was rejected for employment, the wage discrimination plaintiff, if required to prove the absence of each such factor other than race, faces an impossibly onerous burden. See *Burdine*, 450 U.S. at 253. It is for exactly this reason that *McDonnell-Douglas* shifted the burden of specifying the applicable factors to the employer.

In recognition of the employer's vastly greater access to business decisions on pay, the court have long held that, under the Equal Pay Act, the burden of proof shifts to the employer after a showing of sex-based unequal pay for equal work "since the acts underlying the wage differential are usually within his unique knowledge." *EEOC v. Whitin Machine Works, supra*, 635 F.2d at 1097, 1098 (4th Cir. 1980); Secretary of Labor's Interpretative Bulletin on Equal Pay for Equal Work, 29 C.F.R. 800.14 ("The facts necessary to establish that a wage differential has a basis specified in any of the

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[9] These factors are specific exemptions listed in Sec. 703(h) of Title VII. They are also affirmative defenses under the Equal Pay Act which have been absorbed into Title VII by virtue of the Bennett amendment, on which the employer has the burden of proof. See *County of Washington v. Gunther, supra*, 452 U.S. at 169-171; *Kouba v. Allstate Ins. Co., supra*, 691 F.2d at 875; *Schulte v. Wilson Industries, Inc., supra*, 547 F.Supp. at 339-340.

[Equal Pay Act] exceptions are peculiarly within the knowledge of the employer.")[10]

The requirement that the employer come forward with an explanation for a sex-based wage differential between employees performing equal work is equally appropriate in race-based equal pay for equal work cases. Not only is it consistent with prior precedent in sex-based equal pay for equal work cases brought under the Equal Pay Act and Title VII, but it is also fair. The allocation of the burden of proof in an employment discrimination case ought not to be a game. An employer ought to be required to produce evidence of those lawful factors which *in fact* explain wage differentials between employees performing the same work in his workplace; he ought not to be able to sabotage a plaintiff's *prima facie* case by mere speculation on the many possible factors which *might* be relevant to salary differentials, whether or not he actually uses them.[11]

Nevertheless, that is precisely what the lower court allowed, by its facile dismissal of the plaintiffs' statistical multiple regression analysis evidence for not including "all measurable variables *thought* to have an effect on salary level." (emphasis added). It did so despite the

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[10] See also *Corning Glass Works v. Brennan, supra,* 417 U.S. at 196; *EEOC v. Central Kansas Med. Center,* 705 F.2d 1270, 1272 (10th Cir. 1983); *Thompson v. Sawyer,* 678 F.2d 257, 271 (D.C. Cir. 1982); *Kouba v. Allstate Ins. Co., supra,* 691 F.2d at 875; *Odomes v. Nucare Inc., supra,* 653 F.2d at 251, *Brennan v. Owensboro-Daviess County Hospital,* 523 F.2d 1013, 1030-31 (6th Cir. 1975), *cert. den.,* 425 U.S. 973 (1976); *Hodgson v. Brookhaven Gen. Hosp., supra,* 436 F.2d at 722; *Shultz v. American Can Co.,* 424 F.2d 356, 362 (8th Cir. 1970); *Shultz v. Wheaton Glass Co., supra,* 421 F.2d at 266.

[11] As Judge Phillips points out in his dissent below: "[I]t will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race effect coefficient demonstrated by any multiple regression analysis that could be conceived." 751 F.2d at 692-3.

fact that the plaintiffs' statistical evidence, even apart from the many specific examples adduced, showed more than ought to be required for the *prima facie* case—a statistically significant racial impact on salary when not only the job titles, i.e., the work performed, but also education and seniority are held equal. By their statistical evidence alone, the plaintiffs clearly met their burden to establish that a pattern or practice of racially discriminatory unequal pay for equal work existed as a matter of the employer's regular and standard operating procedure. See *Teamsters v. United States*, 431 U.S. 324, 336 (1977); see also e.g., *EEOC v. McCarthy*, 768 F.2d 1 (1st Cir. 1985) (in successful action brought by women faculty under the Equal Pay Act, court gives great weight to multiple regression analysis showing larger salary increases to male faculty members with equal rank, experience, education and seniority).

II. UNEQUAL PAY FOR EQUAL WORK IS A CONTINUING VIOLATION OF TITLE VII; EVERY PAY CHECK WHICH INCORPORATES A DISCRIMINATORY PAY DISPARITY IS A NEW AND SEPARATELY ACTIONABLE ACT OF DISCRIMINATION.

The decision below flatly contradicts prior precedent in the fourth circuit, as well as in other courts of appeals which have all agreed that unequal pay for equal work is a continuing violation. Every paycheck which incorporates a discriminatory pay differential is a new act of discrimination.

In *Jenkins v. Home Ins. Co.*, 635 F.2d 310 (4th Cir. 1980), the fourth circuit held, *per curiam*, that an unequal pay for equal work claim brought by a female Claims Supervisor constituted a continuing violation of both the Equal Pay Act and Title VII. The court reversed summary judgment for the defendant, holding that the lower court had erroneously applied the rule

of *United Air Lines, Inc. v. Evans, supra.* It distinguished *Evans* on grounds equally applicable here—that only one actionable violation had occurred in *Evans*, whereas, in the unequal pay for equal work claim, the company's violation was a continuing one. As the court said:

> unlike *Evans*, the Company's alleged discriminatory violation occurred in a series of separate but related acts throughout the course of Jenkins' employment. Every two weeks, Jenkins was paid for the prior working period; an amount less than was paid her male counterparts for the same work covering the same period. Thus, the Company's alleged discrimination was manifested in a continuing violation which ceased only at the end of Jenkins' employment.

635 F.2d at 312. All of the other courts of appeals which have considered the issue have also held that an equal pay violation occurs not only at the time the employer sets the pay levels, but on every pay day for as long as the discriminatory pay differential continues.[12]

The court in *Jenkins*, pointing to prior fourth circuit decisions that acts of racial discrimination first inflicted at the date of hiring can thereafter continually violate plaintiffs' rights, declared that it viewed the continuing violation issue to be the same in sex cases as in race cases and that it would apply the same rule, "regardless of the type of discrimination alleged." *Id.*

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[12] *EEOC v. McCarthy, supra,* 768 F.2d at 3-4 (1st Cir. 1985) (Equal Pay Act); *Bartelt v. Berlitz School,* 698 F.2d 1003, 1004-1005 (9th Cir. 1983) (Title VII); *Berry v. Bd. of Supervisors, L.S.U.,* 715 F.2d 971, 980-981 & n.14 (5th Cir. 1983) (Equal Pay Act & Title VII); *Hall v. Ledex, Inc.,* 669 F.2d 397, 398 (6th Cir. 1982) (Equal Pay Act & Title VII); *Satz v. ITT Financial Corp.,* 619 F.2d 738, 743-44 (8th Cir. 1980) (Title VII). Cf. *Boyd v. Madison County Mut. Ins. Co.,* 653 F.2d 1172, 1176-1177 (7th Cir. 1981), *cert. den.,* 454 U.S. 1146 (1982) (payment of attendance bonuses to women employees but not to men constituted continuing violation).

Numerous lower courts have also held that race-based unequal pay for equal work establishes a continuing violation of Title VII.[13]

In view of its prior pronouncement in *Jenkins*, and the wealth of precedent to the contrary, the lower court's application of *United Airlines v. Evans* to bar race-based unequal pay for equal work claims is inexplicable. Continuing pay discrimination is not "merely an unfortunate event in history. . . ." On the contrary, it is one with "present legal consequences." (*Evans*, 431 U.S. at 558).[14] On every pay day, the employer pays lower wages to a black than to a white for the same work. Each such act, if left unexplained, establishes a "legally mandatory inference of discrimination. . . ." *Texas Department of Community Affairs v. Burdine*, *supra*, 450 U.S. at 254-255 & n.10; see discussion in Part I above.[15]

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[13] See, e.g., *Wells v. Hutchinson*, 499 F.Supp. 174, 186-187 (E.D. Tex. 1980); *White v. City of Suffolk*, 460 F.Supp. 516, 519-520 (E.D. Va. 1978); *Corbin v. Pan American World Airways*, 432 F.Supp. 939, 944 (N.D. Cal. 1977); *Dudley v. Textron*, 386 F.Supp. 602, 604 (E.D. Pa. 1975); *EEOC v. Hickey-Mitchell Co.*, 372 F.Supp. 1117, 1120 (E.D. Mo. 1973).

[14] *Evans*, like *Hazelwood* and the other cases relied on by the court below involved discrete acts such as discharge and hiring, which occur and are completed at a single point in time. If they happened pre-Act, they were legal; if they happened post-Act, they were illegal, but subject to a time limitation for action under Title VII. In contrast, wage discrimination is an ongoing process which, even if initiated pre-Act, became illegal post-Act if continued without correction. See *Corning Glass Works v. Brennan*, *supra*, 417 U.S. at 205-210 (pre-Equal Pay Act pay differential in favor of men performing equal work to women became illegal after the Act's enactment and was not cured by permitting women to bid for the higher paying job); cf. *IUE v. Westinghouse*, 631 F.2d 1094 (3d Cir. 1980), *cert. den.*, 452 U.S. 967 (1981) (allegation of present sex discrimination in pay derived from an openly sex discriminatory wage structure established by the employer in the late 1930s states an actionable claim under Title VII.)

[15] Moreover, the fact that a defendant has a practice of hiring black employees at an initially discriminatory wage creates an

A contrary holding would immunize from Title VII liability all employers which, as here, installed their current salary systems before its effective date.[16] It cannot be assumed that employers no longer utilize salary systems with discriminatory pre-Title VII origins. Many employers, like the employer here, made only cosmetic changes in discriminatory salary systems after the effective date of Title VII.[17] Congress can not have intended to reward violators of the law by immunizing discriminatory salary systems that are still in effect years

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inference that all successive wage disparities are the product of unlawful discrimination. *Carmichael v. Birmingham Saw Works, supra*, 738 F.2d at 1136 (11th Cir. 1984). See also *Wells v. Hutchinson, supra*, 499 F.Supp. at 196 (E.D. Tex. 1980) (where salaries were initially established at discriminatory levels, percentage increases exacerbated the existing salary disparities, and were themselves discriminatory, because white employees always received more than black plaintiff who held the same job.)

[16] It also presents a classic Catch-22 situation. A black employee who, like many in the instant case, was hired before the effective date of Title VII, had no remedy against pay discrimination at the time he was hired. Under the lower court's holding, he still has no remedy for his lower pay even *after* the enactment of Title VII, because he had failed to take action within 180 days of being hired —although he had no action that he could have taken.

[17] See, for example, *IUE v. Westinghouse, supra*, 631 F.2d at 1097-1098 (plaintiffs alleged that, in 1965, company combined previously male and female jobs into one labor grade scale, but assigned female jobs to lowest labor grades, thus perpetuating prior discriminatorily low pay existing since the 1930s); *Wade v. Miss. Coop. Extension Service*, 528 F.2d 508, 512-513 (5th Cir. 1976) (after 1965, Mississippi Cooperative Extension Service merged previously white and black offices, but prior racially discriminatory pay differentials between black and white employees continued); *Wells v. Hutchinson, supra*, 499 F.Supp. at 183-184 (E.D. Tex. 1980) (same situation with respect to Texas Agricultural Extension Service); cf. *Corning Glass Works v. Brennan, supra*, 417 U.S. at 205-206 (after 1966, company allowed females to bid for previously all-male night inspection jobs, but did not eliminate discriminatory wage differentials which had existed since the 1920s.)

after the enactment of Title VII, merely because they have until recently escaped attention.[18] To paraphrase a lower court decision that sex-based, discriminatory wage payments constitute a continuing violation of the Equal Pay Act, "to hold otherwise would permit perpetual wage discrimination by an employer whose violation . . . had already lasted [for years] without attack . . ." *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041 (5th Cir. 1973).

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[18] Because the plaintiffs in this case were included in Title VII coverage only after the 1972 amendments to the Act (Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103), the 1972 legislative history is directly and particularly relevant to this case. *May Department Stores Co. v. Smith*, 572 F.2d 1275 (8th Cir.), *cert. den.*, 439 U.S. 837 (1978). By 1972, Congress had concluded that state and local governments, such as the defendants here, "have failed to fulfill their obligation to assure equal job opportunity . . . . Not only do [they] consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job. . . . [T]he existence of discrimination is perpetuated by both institutional and overt discriminatory practices, and . . . past discriminatory practices are maintained through *de facto* segregated job ladders, invalid selection techniques, and stereotypical misconceptions by supervisors regarding minority group capabilities." S. Rep. No. 92-415, 92nd Cong., 2d Sess. (1972), 118 Cong. Rec. 1070 (Jan. 25, 1972), reprinted in *Legislative History of Equal Employment Opportunity Act of 1972*, Subcomm. on Labor of Sen. Comm. on Labor and Public Welfare, 896.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

1. The *American Association of University Women (AAUW)*, founded in 1881, is a private, non-profit women's organization with more than 193,000 members nationwide. It has lobbied on public policy issues since 1898. AAUW promotes equity for women, education and self-development over the life span, and positive societal change.

2. The *American Civil Liberties Union (ACLU)* is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to help eliminate the pervasive problem of gender-based discrimination. It has participated, both directly and as *amicus curiae*, in the litigation of many cases before the Supreme Court and other courts challenging sex discriminatory practices, including cases such as *County of Washington v. Gunther*, 452 U.S. 967 (1981), involving interpretation and enforcement of Title VII of the Civil Rights Act of 1964, as amended.

3. The *American Nurses' Association (ANA)* represents the nation's 1.7 million registered nurses, the nation's largest group of health care professionals. Nursing is one of the most sex-segregated job classifications in this country. It is 97% female and has a labor force participation rate of 77%.

For more than fifty (50) years, ANA has sought to end sex and race discrimination in employment, particularly sex- and race-based discrimination in wage setting. ANA is currently the lead plaintiff-appellant in *American Nurses' Association, et al. v. State of Illinois, et al.*, a case currently on appeal from the United States District Court, Northern District of Illinois, Eastern Divi-

sion, which is being brought under Title VII on the issue of sex-based wage discrimination.

ANA has a strong interest in the outcome of the Court's decision in this and other cases which seek the elimination of sex- and race-based discrimination.

4. The *Asian Pacific American Bar Association of the Greater Washington, D.C. Area* is composed of attorneys who are committed to addressing legal and social issues concerning the Asian Pacific Community, as well as issues affecting other racial minorities, women, the disabled and other groups which have been historically excluded from the legal and political process.

5. The *Coalition of Labor Union Women (CLUW)* was founded in 1974 to advance the interests of women union members with respect to various employment related matters. CLUW is composed of over 18,000 members representing 59 labor unions. Through its educational and advocacy activities, CLUW has addressed the numerous problems of women in the workforce and has sought an end to sex-based employment inequities.

6. The *Comparable Worth Project* is a non-profit organization established in 1980 in Oakland, California, which supports and generates workplace, government and community activities on the issue of pay equity for women's occupations. It provides research, education, training and technical assistance for workers, unions, employers, lawyers, legislators, grassroots organizations and others.

7. *Equal Rights Advocates, Inc. (ERA)* is a San Francisco-based public interest legal and educational corporation specializing in the area of sex discrimination. The organization has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. A major focus of the work of ERA, Inc. has been in the area of gender equality in the workplace because economic equality is fundamental to women's ability to achieve equality in other spheres of so-

ciety. In particular, ERA, Inc. is committed to eliminating all forms of sex-based wage discrimination. Staff attorneys represented the plaintiffs in *Kouba v. Allstate Insurance Company*, 691 F.2d 872 (9th Cir. 1982), and ERA has participated as *amicus curiae* in *Hein v. Oregon College of Education*, No. 82-3491 (9th Cir. 1983). In addition, the organization has represented plaintiffs in state and federal courts. It also has participated as *amicus curiae* in numerous other cases.

8. *Federally Employed Women, Inc.* is an international nonprofit membership organization which represents the concerns of the over 800,000 women employed by the federal government. F.E.W. was founded in 1968 for the purposes of erasing sex discrimination and increasing job opportunities in the federal workplace.

9. The *League of Women Voters Education Fund (LWVEF)* is a non-partisan, non-profit educational organization, one of whose purposes is to increase public understanding of major public policy issues. The LWVEF undertakes research, writes publications, monitors and litigates on current issues such as employment discrimination. The LWVEF seeks the eradication of any form of discrimination that results in the underpayment of work performed by minorities and women.

10. The *Mexican American Women's National Association (MAWNA)* was organized in 1974 to provide a national voice for Mexican American women of varied political, educational, professional and geographic backgrounds. MAWNA works for the advancement of Mexican American women by promoting leadership development and increasing a national awareness about their presence and concerns.

11. *9 to 5, The National Association of Working Women* is a membership organization of women office workers which seeks to improve working conditions across the country. Major areas of concern include pay and pay equity, safe automation of offices, elimination of dis-

crimination by race, sex and age, and recognition of rights and respect for working women.

12. The *National Federation of Federal Employees (NFFE)* is a labor organization which represents approximately 150,000 federal employees throughout the country pursuant to Title VII of the Civil Service Reform Act, Pub. Law 95-454, 5 USC § 7101 *et seq.* NFFE is composed of more than 450 affiliated locals which represent employees in federal agencies throughout the government. NFFE represents employees whose positions are classified under both the General Schedule and the Wage Grade systems. NFFE has a mandate from its members to work for pay equity between men's and women's jobs and to challenge the discriminatory wage practices that exist under the current job classification system used by the federal government.

13. The *NOW Legal Defense and Education Fund (NOW LDEF)* is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination, including participation as an *amicus* in *County of Washington v. Gunther*, 452 U.S. 161 (1981) before this Court.

14. *Office & Professional Employees International Union, AFL-CIO (OPEIU)*, in representing white Collar workers in the United States, has fought for the rights and interests of women and minorities for over forty years. In Congress and in the courts, OPEIU has sought to eliminate discrimination on all fronts, including wage discrimination. Support of this *amicus curiae* brief is yet another of OPIEU's efforts in this struggle, although

non-discriminatory pay is more than a women's or minority issue; it is an issue for all working people.

15. The *Service Employees International Union (SEIU)* represents 850,000 workers in the U.S. and Canada. Our workers work primarily in the service sector. Most of our members work in jobs that suffer from historic pay discrimination. SEIU is committed to eliminating discrimination in pay, hiring, and promotion against women and minorities.

16. *Women Employed* is a Chicago-based organization with a membership of 3,000 women workers. Over the past nine years, the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

17. The *Women's Legal Defense Fund* is a non-profit, tax exempt membership organization, founded in 1971 to provide *pro bono* legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.

18. The *Young Women's Christian Association of the USA, National Board*, is elected by the triennial national convention of the YWCA to make policy decisions and carry out convention mandates between conventions. The YWCA is the world's oldest and largest women's autonomous membership movement, and is active in more than 80 countries world-wide. One of the chief priorities of the National Board is the realization of the principle of equal pay for work of comparable value.

Supreme Court, U.S.
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Nos. 85-93 & 85-428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,
v.
WILLIAM C. FRIDAY, *et al.*,
Respondents.

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
WILLIAM C. FRIDAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INDUSTRIAL UNION DEPARTMENT, AFL-CIO AS AMICI CURIAE SUPPORTING PETITIONERS

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TABLE OF CONTENTS

	Page
ARGUMENT	2
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)	7
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	7-8
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	5, 8
Hazelwood School District v. United States, 433 U.S. 299 (1977)	4, 9-11
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978)	7
Machinists Local v. Labor Board, 362 U.S. 411 (1960)	4, 14-15
Teamsters v. United States, 431 U.S. 324 (1977)	5
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	8
United Air Lines v. Evans, 431 U.S. 553 (1977)	4-6, 9-10, 12
United States Postal Service v. Aikens, 460 U.S. 711 (1983)	8

Statutes

Equal Pay Act, 29 U.S.C. § 206(d)	8
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e	*passim*
National Labor Relations Act, § 10(b), 29 U.S.C. § 160(b)	4, 14-15

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE INDUSTRIAL UNION DEPARTMENT, AFL-CIO AS AMICI CURIAE SUPPORTING PETITIONERS

This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and the Industrial Union Department AFL-CIO ("IUD") with the consent of the parties. The AFL-CIO is a federation of 95 national and inter-

national unions having a total membership of over 13,000,000 working men and women. The IUD is composed of 54 national and international unions having a total membership of approximately 5,000,000 industrial workers.

ARGUMENT

Introduction and Summary

Amici submit this brief for the sole purpose of addressing the question presented by the United States *et al.*, which is also encompassed in the first question presented by Bazemore *et al.* That question is stated by the United States as follows:

> Whether black state employees establish a claim under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by identifying current salary disparities between themselves and white employees holding the same jobs, when such disparities result from a state policy before 1965 of paying blacks lower salaries than whites. [United States' Petition for Certiorari, p. I.] [1]

In addressing this question, we do not enter the vigorous controversy over whether this question is properly presented on this record. See, *e.g.*, Respondents' Brief in Opposition To the Petition of the United States, pp. 6-16. Instead, we assume that the record (and the findings below, insofar as the record evidence is conflicting) establish the following, which we understand to be the factual

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[1] The first question in the *Bazemore* petition is stated as follows:

> Did the court of appeals err in holding that it is both legal and constitutional for a state to intentionally pay black employees less than white employees in the same job, so long as the original decision establishing that discriminatory wage differential was not itself the subject of a timely charge or action. [Petition for Certiorari in No. 85-93, p. i.]

Because we believe the court below erred in its resolution of this Title VII issue, we do not address the constitutional issue raised in the *Bazemore* petition.

predicates for the United States petition's question presented:

1. It was the employer's stated policy and practice, prior to 1965, to pay newly-hired blacks lower initial salaries than those paid whites hired at the same time to do the same job.
2. Within the relevant time period (here, following Congress' extension of Title VII to public employers in 1972), the employer has continued to pay blacks hired prior to 1965 less than whites hired at the same time for doing the same job.
3. That continuing disparity is not due to the intervention of neutral considerations such as a change in the employees' respective job duties, but rather, reflects that the employer simply is presently unwilling to incur the additional cost that would result from paying the blacks at the same level as the whites doing the same job.[2]

On these facts, we believe it is clear that the employer has committed a present violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Our argument proceeds as follows:

In Part I, we show that an employer who initially created a salary disparity between blacks and whites doing the same job because of their races, and who is presently maintaining that disparity because unwilling to spend the additional money that would be required to pay the blacks as much as the whites, is engaged in a present act of race discrimination. It is irrelevant that the employer

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[2] In the instant case, it appears to be common ground that current salaries are determined, at least in part, by decisionmakers in each of 100 counties, so that blacks *and* whites holding the same job are paid differently in different counties. For analytical purposes, we have isolated the paradigmatic case; *viz.*, one in which blacks are currently paid less than whites holding the same job in the same county. We have done so because as the petitioners present the case the current disparaties between blacks and whites are not the product of race-neutral differences in the criteria for salary-determination applied by different counties.

may not presently possess the racial hostility that fueled the creation of the differential; to pay blacks less than whites doing the same job simply to save money is *itself* a discriminatory purpose.

In Part II, we show that the reliance of the court below on *United Airlines v. Evans*, 431 U.S. 553 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), is misplaced; in neither of those cases was there a current act of differential treatment undertaken with a discriminatory purpose, as there is here.

In Part III, we suggest that alternative approaches advanced by the petitioners for reversal are more difficult than the approach suggested above, and ought not to be reached. The *Bazemore* petitioners' reliance on a "continuing violation" theory—which we assume is aimed at overcoming the fact that the employer no longer has the racial hostility that originally actuated the salary differential—is unnecessary, for as we have shown the employer's present motive is discriminatory; and it is misleading insofar as it focuses attention on the mere fact of continuity of employment practice rather than on the present basis for that practice. And the United States' reliance on an analogy to the treatment of racially motivated seniority systems should not be considered, because it would unnecessarily require this Court to decide a difficult, unrelated legal issue simply to determine that the analogy is apt, *viz.* whether the limitations principle announced for the NLRA in *Machinists Lodge v. Labor Board*, 362 U.S. 411 (1960), is, as the United States implicitly assumes, inapplicable to Title VII.

I

Plaintiffs' claim in this case is that the employer is intentionally discriminating against black employees in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). That section makes it unlawful for an employer to "discriminate against any individual with

respect to his compensation . . . *because of such individual's race* . . . ." And, of course, to be actionable such discrimination must have occurred within the limitations period established by Title VII, which requires would-be-plaintiffs to file a charge with the Equal Employment Opportunity Commission "within one hundred and eighty days after the alleged unlawful employment practice occurred," § 706(e), 42 U.S.C. § 2000-5(e). Given that limitations period, "the critical question is whether any *present* violation exists," *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977) (emphasis added)—whether *at present* (*i.e.*, within 180 days of the filing of the charge) the employer is treating blacks differently than whites "because of" their race.

In the instant case, on the facts we set out at p. 3, *supra*, there is no question that blacks are presently being paid less than whites doing the same job. The determinative question, therefore, is whether race is the *reason* that presently accounts for that differential or whether the employer is acting on race-neutral grounds in fixing the compensation of his employes.

This Court has made clear that where an employer treats black employees less favorably than white employees who are in all relevant respects similarly situated, an intent to discriminate on the basis of race can "be inferred from the mere fact of differences in treatment." *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). This is true because "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting," and therefore "when all legitimate reasons" for differentiating between employees "have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

In this case, on the facts we have assumed to be established, plaintiffs have shown the type of "difference in treatment" from which it may be inferred that the employer is presently discriminating on the basis of race: plaintiffs have proved that black employees who were hired at the same time as whites presently are being paid less than those whites for performing the same jobs. Moreover, plaintiffs have proved that the pay differential between blacks and whites was *originally* created, prior to 1965, because of race,[3] and that there have been no intervening "neutral" factors (such as changes in the employees' respective job duties) that explain the existence of the differential at present. Unless rebutted, this evidence would provide the most compelling basis for concluding that it is their race that currently explains why blacks are being paid less than whites.

The employer, however, has demonstrated (we have assumed) that the racial animus that initially prompted the salary differential—the blind hostility toward blacks as blacks—no longer obtains, and that the differential has been maintained by the employer out of concern for the "prohibitively costly budgetary alterations," Pet. App. 121a-122a, that would be required to pay blacks hired prior to 1965 the same salary as is paid to whites hired prior to 1965 for doing the same job. But this change in the employer's *reason* for treating blacks and whites differently does not lead to a change in the legal result: *paying blacks less than comparably situated whites in*

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[3] Plaintiffs of course were entitled to introduce evidence showing that the employer had a dual salary scale for black and white hires prior to 1965. This Court has made clear that evidence of a "discriminatory act which occurred before the statute was passed . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." *United Air Lines v. Evans, supra,* 431 U.S. at 558.

order to save money is itself a present act of discrimination on the basis of race.[4]

The financial burden of paying blacks the same as whites is no more a "neutral" explanation for continuing an existing pay disparity than it would be for creating a new one by paying blacks hired today less than similarly-situated whites hired today. It may well be that social forces make it possible to attract or retain black employees at lower salaries than whites (because, for example, blacks have fewer job opportunities elsewhere), but that surely cannot serve as a justification for paying blacks less than whites to do the same job. To permit such a defense would render Title VII's ban on compensation discrimination a nullity. This Court noted in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 716-717 (1978), that "neither Congress nor the courts have recognized" a "cost-justification defense" under Title VII to liability for deliberately treating women less favorably than men. The same surely is true as to race discrimination.[5] See also, *Corning Glass Works*

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[4] Because the consideration in text is dispositive, we relegate to a footnote the observation that in the context of this case a professed concern for "prohibitively costly budgetary alterations" can not survive scrutiny. The employer has not held the salaries of its employees constant but has instead periodically raised those salaries. The employer has thus chosen to increase the salaries of white employees rather than aplying those same revenues to raising blacks' salaries to the level of the whites'. And if the response is that the employer feared whites would quit unless furnished those increases, whereas equalization was not necessary to induce blacks to remain, that is merely confirmation that present social conditions enable the employer to discriminate on the basis of race.

[5] As this Court has established, the fact that an employer may have been actuated not by racial or gender-based hostility but by self-interest or even by some altruistic consideration is not a defense under § 703(a)(1) to treating blacks differently from whites or men or women. See, for example, *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083-85 (1983); *Manhart*, 435 U.S. at 709.

v. Brennan, 417 U.S. 188, 205 (1974) (Congress did not intend the availability of women at lower wages to constitute a justification for paying unequal wages for equal work under the Equal Pay Act.) Thus, the employer's invocation of budgetary considerations is not a non-discriminatory basis for the pay differential; it is merely an explanation of why the employer is presently discriminating on the basis of race.[6]

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[6] While the analysis in text is sufficient to dispose of the instant case, we wish to note our disagreement with the suggestion in the United States petition (at p. 18, n.20) that pay discrimination under Title VII cannot be proved circumstantially from the fact that blacks are paid less than comparably situated whites but can be proved only by some more direct form of evidence of discriminatory intent. Such a notion conflicts with the uniform approach of this Court.

As this Court has recognized, "[t]here will seldom be 'eyewitness' testimony" as to the employer's basis for differentiating between employees. *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983). Consequently, "[a]s in any lawsuit, the [Title VII] plaintiff may prove his case by direct or circumstantial evidence," and the courts are to "consider all the evidence, giving it whatever weight and credence it deserves"; indeed it is error to require a Title VII plaintiff to submit direct evidence of discriminatory intent because it is a "general principle that any Title VII plaintiff [may] carry the initial burden of offering evidence adequate to create an *inference* that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters v. United States, supra*, 431 U.S. at 358 (emphasis added.)

This lesson is fully applicable in the context of claims of discrimination in compensation. Where blacks show that they are paid less than similarly-situated whites, and negate "the most common non-discriminatory reasons" for the differential, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), that proof raises an inference of discrimination for the very reason such inferences have been drawn in other Title VII cases: that discrimination between comparably-situated blacks and whites, "if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters, supra*, 438 U.S. at 577. In such a case, if the employer proffers no innocent explanation for the differential, or proffers an explanation that is found to be pretextual, the plaintiff is en-

II

The court below believed that this Court's holdings in *United Air Lines v. Evans*, *supra*, and *Hazelwood School District v. United States*, 433 U.S. 299 (1977) compel the conclusion that Title VII does not render the current wage disparity between whites and blacks unlawful. That belief is erroneous.

In *Evans*, the Court held that an employer did not violate Title VII by applying to the respondent employee its uniform rule—regularly applied to men and women alike—that employees who are discharged and later rehired are treated as new employees for all purposes and accorded no credit for their prior service. The plaintiff contended that the rule was discriminatory as applied to her, because her discharge several years before had been discriminatorily motivated. This Court held that a challenge to the discharge was time-barred, and accordingly the discharge was "an unfortunate event in history which has no present legal consequences," 431 U.S. at 558. Plaintiff's status thus was no different than that of any other employee discharged and later rehired. And plaintiff did not allege, let lone prove, that the employer discriminated on the basis of sex as between such employees:

> Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees, or that the failure to credit prior service differentiates in any way between prior service by males and prior service by females. Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex. [*Id.* at 557-558.]

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titled to prevail. *Burdine*, 450 U.S. at 254; *Aikens*, 460 U.S. at 714. It is our view, accordingly, that plaintiffs could have prevailed in the instant case even had they not introduced evidence of the pre-1965 discriminatory salary practices (assuming the facts to be those we set out at p. 3, *supra*, in all other respects).

By contrast, the claim in the instant case is precisely that the employer's current pay practice "treats existing [black] employees differently from existing [white] employees" and "differentiates between similarly situated [blacks and whites] on the basis of [race]." Here, plaintiffs do not seek to infuse a facially neutral practice, not itself unlawful, with illegality by reference to a time-barred or pre-Act wrong. Rather here, the present practice under attack—paying black employees less than white employees doing the same job—is not "neutral in its operation," *id.* at 558, and plaintiffs have shown that the employer has maintained this race-skewed differential with discriminatory intent (pp. 6-7, *supra*).

In *Hazelwood*, the issue was whether the employer, a public school district, had engaged in a pattern or practice of race discrimination in the hiring decisions made after Title VII became applicable to public employers. The plaintiff sought to establish such a pattern or practice by introducing statistics showing that the present racial composition of the employer's workforce did not reflect the racial composition of the workforce from which the employer hired. In the passage of the *Hazelwood* opinion that the court below thought significant for the instant case, this Court discussed the weight to be accorded such evidence:

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. *A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.* For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical workforce disparities,

> the employer must be given an opportunity to show that "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." 431 U.S., at 360. [453 U.S. at 309-310, emphasis added, footnote omitted.]

The court below believed that the sentence in *Hazelwood* italicized above (quoted, 751 F.2d at 760) dictated the resolution of this case. But the difference between that case and this is self-evident. An employer who had followed a discriminatory hiring policy prior to Title VII's effective date and who embarked on a nondiscriminatory hiring policy on that date would have done nothing that could constitute a violation of Title VII. In contrast, the employer in the instant case has, subsequent to the effective date of the Act, repeatedly paid blacks less than similarly-situated whites for performing the same work—indeed, has done so every payday. What is more, the employer in the instant case has periodically reevaluated and adjusted its payscale subsequent to the effective date of the Act, and each time, without having any nondiscriminatory reason for so doing, has settled upon a payscale that contains a disparity between black's wages and the wages of whites doing the same job. And, as shown, the basis for that current disparity is the race of the employees. Thus, unlike the hypothesized employer in *Hazelwood* whose current practices were "wholly nondiscriminatory," the practice of the employer here is not. And it is this current, discriminatory practice that is at issue here.

III

What we have said to this point represents, we believe, the proper analytical approach to the disposition of the question presented. Petitioners have advanced alternative approaches that we believe do not provide a sound basis for resolving that question.

A. The *Bazemore* petitioners have analyzed the question in terms of whether there is here a "continuing" violation (*Bazemore* Pet. at 17-24). We believe that label misfocuses analysis, and should be avoided.

Plaintiffs' effort has been undertaken, we assume, to counter the employer's claim that while the pay differential was originally created for reasons of racial animus, the differential has been maintained in the relevant time period for "economic" reasons, *i.e.*, the financial burden of paying blacks and whites the same salaries. As we have shown, pp. 6-7, *supra*, the current practice is illegal if that is the employer's rationale, for even on that rationale the employer is presently treating blacks differently than similarly situated whites because of their race. If, however, the employee had a *lawful* basis, unrelated to race, for the current pay differential, there would not be a violation simply because the practice (as distinct from the motive actuating it) was "continuing." Consequently, "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *United Air Lines v. Evans*, *supra*, 431 U.S. at 558 (emphasis in original).[7]

B. The United States has suggested that the correct answer to this case can be derived by analogy to the

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[7] If an employer is found to have engaged in a present violation, at the remedy stage of the case it may become necessary to determine whether that violation is "continuing." This is because of the conjunction of section 703(e), which requires that a Title VII charge be filed within 180 days of the act complained of, and section 706(g), which authorizes an award of backpay for two years prior to the filing of the charge. It is unlikely that Congress intended that if *one* wrongful act is timely challenged the employee can recover backpay for *unrelated* wrongs committed by the employer that were not themselves the subpect of a timely change. If, as seems likelier, Congress intended to provide a remedy for acts prior to the relevant time period only for earlier injuries resulting from a course of conduct that continued into the relevant time period, it becomes necessary for that purpose to distinguish between violations that have been "continuing" and those that have not. Indeed, in a disparate pay case such as that presented here, once it is determined that a current (*i.e.*, timely challenged) violation has been committed, the *Bazemore* petitioners' analysis would surely demonstrate that backpay is authorized for two years prior to the filing of the charge.

treatment of "intentionally discriminatory seniority system[s]":

> [J]ust as an intentionally discriminatory seniority system, even one that was adopted before the Act became effective, is unlawful (*Pullman-Standard v. Swint*, 456 U.S. 273, 276-277 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982)), so that it affords no justification for current employment practices that have a race-based effect, so the courts of appeals have correctly recognized that an intentionally discriminatory pre-Act salary system affords no justification for current salary practices that have a race-based effect [U.S. Pet. at 18].

But the two practices that the United States would compare are conceptually different, and require different analyses for their resolution; indeed, the seniority case is by far the harder of the two and, contrary to the assertion of the United States, it has not been resolved by this Court.

The cases cited by the United States stand for the proposition that discriminatorily motivated seniority systems do not enjoy the protection accorded by § 703(h) to bona fide seniority systems. And in *Swint*, the Court addressed on its merits, without suggesting that there might be a timeliness problem, a claim that a seniority system was unlawful because allegedly negotiated in 1954 with discriminatory intent. But the question whether such systems are indefinitely subject to challenge was not presented in those cases, for no challenge to the timeliness of the plaintiffs' claims was asserted. And resolution of that timeliness question turns upon a consideration not present in the instant case: whether a practice that is *neutral* on its face, and that is not shown to have been *maintained* in the relevant time period for discriminatory reasons, may be challenged *solely* on the ground that the practice was initially *adopted* (in a time-barred period) with discriminatory motive. This Court

has not addressed that question under Title VII, but the identical question has been answered by this Court under the National Labor Relations Act in a manner contrary to the United States' position.

In *Machinists Local v. Labor Board*, 362 U.S. 411 (1960), the Court addressed the timeliness of a challenge to the maintenance of a collective bargaining agreement that was alleged to be unlawful because adopted at a time when the union did not represent a majority of the employees. Under existing Board law, which the Court assumed to be correct, "the continued enforcement, as well as the execution, of this collective bargaining agreement constituted an unfair labor practice, and . . . these are two logically separate violations, independent in the sense that they can be described in discrete terms." 362 U.S. at 422. Nevertheless, the Court held that in light of the NLRA's six-month time limit for filing charges (Section 10(b), 29 U.S.C. § 160(b)), "the enforcement . . . of such an agreement as this constitutes a *suable* unfair labor practice only for six months following the making of the agreement." 362 U.S. at 423 (emphasis in Court's opinion.)[8] The Court, noting that a contrary holding "would mean that the statute of limitations would never run in a case of this kind," *id.* at 416, reasoned as follows:

> Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we

[8] See also, *id.* at 422: "a finding of violation which is *inescapably* grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso" (emphasis added, footnote omitted). The Court also held, of course, that the *execution* of the agreement could be challenged as an unfair labor practice only within six months of the date of execution, *id.* at 415, 419.

> think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," . . . and of course to stabilize existing bargaining relationships. [*Id.* at 419, footnote omitted.] [9]

The *Machinists Local* Court was careful to distinguish the case at hand from two hypothetical cases:

> [T]he vice in the enforcement of this agreement is not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validity executed but unlawfully administered. [*Id.* at 423.]

The instant case involves a pay practice that is "invalid on its face," and that is being maintained currently for a reason that is not permissible under Title VII. There is thus no occasion here to decide whether the analysis of *Machinists Local* is applicable under Title VII, or whether the contrary analysis implicit in the government's attempted analogy should apply under Title VII.

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[9] In *Machinists Local*, the agreement was executed subsequent to the enactment of the NLRA. We assume, however, that the Court would have held a challenge to the post-Act enforcement of an agreement executed with a minority union prior to the effective date of the Act to be actionable if filed within six months of the Act's effective date. For like reasons, if the holding of *Machinists Local* were applicable to Title VII, we assume that facially neutral seniority systems negotiated with discriminatory intent prior to the effective date of Title VII were subject to challenge promptly—within the length of the limitations period—after Title VII became effective.

CONCLUSION

For the reasons set forth above, the decision below on the question presented by the United States petitioners and the first question presented by the *Bazemore* petitioners should be reversed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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32pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	8
THE COURT OF APPEALS PROPERLY ALLOCATED THE BURDENS OF PROOF IN THIS DISPARATE TREATMENT PATTERN OR PRACTICE CASE INVOLVING THE USE OF A MULTIPLE REGRESSION ANALYSIS	8
I. To Establish A Prima Facie Case Of An Employer's Pattern Or Practice Of Disparate Treatment, A Plaintiff's Multiple Regression Analysis Must Account For Variables Reasonably Viewed As Determinants Of Salary	10
A. A Plaintiff Has The Burden To Account For Relevant Variables	12
1. The Plaintiff's Regression Analysis Must Include The Relevant Objective And Quantifiable Factors Actually Used By The Employer To Make Salary Determinations	12
2. Where The Plaintiff's Regression Does Not Account For Subjective And Unquantifiable Variables, Evidence Regarding These Relevant Variables Must Be Introduced In Some Other Form To Establish A Prima Facie Case	15
B. The Requirement That A Plaintiff Using A Regression Analysis Account For Relevant Variables As Part Of Its Prima Facie Case Is Consistent With The Legal Requirements And Logical Basis For Establishing A Pattern Or Practice Of Disparate Treatment	18

TABLE OF AUTHORITIES—Continued

Page

II. A Defendant Need Only Articulate A Non-discriminatory Reason For Its Conduct By Identifying A Relevant Variable Omitted From Plaintiff's Regression, And Need Not Disprove Plaintiff's Case At Rebuttal 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: Page

Agarwal v. Arthur G. McKee & Co., 19 FEP Cases 503 (N.D. Cal. 1977), *aff'd*, 644 F.2d 803 (9th Cir. 1981) 14, 15
Bazemore v. Friday, C.A. No. 2879 (E.D.N.C. Aug. 20, 1982), *aff'd*, 751 F.2d 662 (4th Cir. 1984) 5, 13, 20
Capaci v. Katz & Besthoff, 711 F.2d 647 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) 22
Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985) 17
Connecticut v. Teal, 457 U.S. 440 (1982) 3
Cooper v. Federal Reserve Bank, —— U.S. ——, 104 S.Ct. 2794 (1984) 18
Coser v. Moore, 587 F. Supp. 572 (E.D.N.Y. 1983), *aff'd*, 739 F.2d 746 (2d Cir. 1984) 14, 15
Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983), *cert. denied sub nom., James v. Tennessee Valley Authority*, 465 U.S. 1066 (1984) 13, 14
EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983), *rev'd and remanded on other grounds sub nom., Cooper v. Federal Reserve Bank*, —— U.S. ——, 104 S.Ct. 2794 (1984) 11-12
EEOC v. Hartford Fire Insurance Co., 31 FEP Cases 531 (D.D.C. 1983) 14
EEOC v. International Business Machines Corp., 583 F. Supp. 875 (D. Md. 1984) 14, 19
EEOC v. Sears, Roebuck & Co., C.A. No. 79C 4373 (E.D. Ill. Jan. 31, 1986), *reprinted in* Daily Labor Report (BNA) D-1 (Feb. 6, 1986) .. 12, 13, 14, 15, 16, 17
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 3, 9
Grano v. Department of Development, 699 F.2d 836 (6th Cir. 1983) 21-22
Greenspan v. Automobile Club of Michigan, 495 F. Supp. 1021 (E.D. Mich. 1980) 17
Hazelwood School District v. United States, 433 U.S. 299 (1977) 10, 18

TABLE OF AUTHORITIES—Continued

Page

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ..... *passim*
James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) 16
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 9, 10, 20
Melani v. Board of Higher Education, 561 F. Supp. 769 (S.D.N.Y. 1983) 17
Penk v. Oregon State Board of Higher Educ., C.A. No. 80-436 (D. Or. Feb. 13, 1985) ..... *passim*
Pouncy v. Prudential Insurance Co., 499 F. Supp. 427 (S.D. Tex. 1980), *aff'd*, 668 F.2d 795 (5th Cir. 1982) 14
Segar v. Civiletti, 508 F. Supp. 690 (D.D.C. 1981), *rev'd in part sub nom., Segar v. Smith*, 738 F.2d 1249 (D.C. Cir.), *cert. denied sub nom., Meese v. Segar*, 105 S. Ct. 2357 (1985) 22
Sobel v. Yeshiva University, 566 F. Supp. 1166 (S.D.N.Y. 1983) 14, 16
Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 511 (1984) 18
Stastny v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314 (W.D.N.C. 1978), *aff'd in part*, 628 F.2d 267 (4th Cir. 1980) 13, 19
Sweeney v. Research Foundation, 711 F.2d 1179 (2d Cir. 1983) 22
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... *passim*
Tolliver v. Yeargan, 567 F. Supp. 116 (S.D. Ark. 1983), *aff'd*, 728 F.2d 1076 (8th Cir. 1984) 14
Trout v. Hidalgo, 517 F. Supp. 873 (D.D.C. 1981), *rev'd in part sub nom., Trout v. Lehman*, 702 F.2d 1094 (D.C. Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1056 (1984) 22
United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) 18

TABLE OF AUTHORITIES—Continued

Page

Valentino v. United States Postal Service, 511 F. Supp. 917 (D.D.C. 1981), *aff'd*, 674 F.2d 56 (D.C. Cir. 1982) 14, 18
White v. City of San Diego, 605 F.2d 455 (9th Cir. 1979) 12
White v. Vathally, 732 F.2d 1037 (1st Cir.), *cert. denied*, 469 U.S. ——, 105 S.Ct. 331 (1984) 22
Wilkins v. University of Houston, 471 F. Supp. 1054 (S.D. Tex. 1979), *vacated and remanded*, 654 F.2d 388 (5th Cir.), *vacated and remanded on other grounds*, 459 U.S. 822 (1982), *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983) 10-11

Federal Statute:

Title 42, United States Code (1982)

§ 2000e, *et seq.* (Title VII, Civil Rights Act of 1964, as amended) ..... *passim*

Miscellaneous:

D. Baldus and J. Cole, *Statistical Proof of Discrimination* (1980 & Supp. 1985) 11
D. Bloom and M. Killingsworth, *Pay Discrimination Research and Litigation: The Use of Regression*, 21 Indus. Rel. L. J. 318 (1983) 11
T. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299 (1984) 12, 13
M. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737 (1980) 15
F. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702 (1980) 11, 12
Note, *Title VII, Multiple Linear Regression Models, and the Courts: An Analysis*, 46 Law & Contemp. Probs. 283 (1983) 15
B. Schlei and P. Grossman, *Employment Discrimination Law* (BNA) (2d ed. 1983 & Supp. 1983-84) 21, 22

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae. The

parties' written consents to file this brief have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are committed firmly to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various equal employment laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* EEAC's members maintain wage and salary schedules that comply with Title VII's non-discrimination requirements. Thus, EEAC has a direct interest in one of the issues presented for the Court's consideration in the instant case—whether a district court properly may dismiss allegations of a pattern or practice of disparate treatment which are based on multiple regression analyses that fail to account for relevant variables that are likely to affect salary deter-

minations. EEAC takes no position regarding whether the plaintiffs in the instant case established a timely claim under Title VII for current wage disparities that result from pre-Act discrimination, but rather limits its discussion herein to the issue of the appropriate burdens of proof in cases involving the use of multiple regression analyses.

Because of its interest in the issues of statistical proof of discrimination under Title VII, and the relative burdens required of plaintiffs and defendants thereunder, EEAC has filed amicus curiae briefs with this Court in numerous cases involving the interpretation of that Act, including *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

STATEMENT OF THE CASE

Bazemore and more than fifty other employees ("Bazemore" or "plaintiffs") sued officials of the North Carolina Agricultural Extension Service ("NCAES" or "defendants"), alleging a pattern or practice of intentional race discrimination. Before 1965, NCAES agents, who provide agricultural and other educational services to state residents, were divided racially into separate branches. Prior to 1965, NCAES had paid black agents serving black constituents a lower salary than white agents in a similar capacity.

NCAES eliminated these separate branches in 1965, shortly after the effective date of Title VII, by merging the two branches into a single organization.

NCAES attempted to eliminate pre-Act salary disparities by, for example, setting uniform minimum starting salaries for all agents. Wage disparities, however, had not been entirely eliminated when this suit was filed in 1971, or in 1972 when Title VII was amended to require compliance by state agencies.

At trial, the Justice Department, as intervenor, introduced multiple regression analyses comparing the salaries of black and white agents for the years 1974, 1975 and 1981. These regression analyses, which controlled for four variables allegedly determinative of salary (race, education, tenure and job title), suggested statistically significant racial effects in 1974 and 1975, but not 1981. These regressions did not control for across-the-board and percentage pay increases. NCAES introduced regressions which also added quartile rank, a measure of job performance, yielding statistically significant disparities in 1975, but not 1981.

The district court ruled in favor of NCAES on all counts. First, the court ruled that a pre-Act difference in salaries need not be affirmatively eliminated. In addition, the district court rejected the Justice Department's regression analyses as flawed because the regressions failed to account for a number of relevant variables, including across-the-board and percentage pay increases. The court concluded that while the plaintiffs had "probably made out a prima facie case with respect to defendants' promotion and salary practices," the defendant "articulat[ed] plausible reasons for its actions . . . which the court found convincing." Pet. App. 190a.[1]

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[1] "Pet. App." refers to the appendix filed with the petition in No. 85-93. "Justice Br." refers to the Brief for the Federal

The panel majority of the Fourth Circuit affirmed, holding that while discrimination existed before the enactment of Title VII, the law does not require that a "pre-Act discriminatory difference in salaries [. . . be] affirmatively eliminated." *Bazemore v. Friday*, 751 F.2d 662, 670 (4th Cir. 1984). Similarly, the appeals court affirmed the district court's rejection of the plaintiffs' regression analysis because the figures analyzed "reflect the effect of pre-Act discrimination" and fail to include "variables which ought to be reasonably viewed as determinants of salary." *Id.* at 672. Judge Phillips dissented in part, reasoning that salary differentials continued "until at least 1976," and that the statistical analyses were "wholly consistent" in showing a substantial race-based disparity. *Id.* at 693, 694.

SUMMARY OF ARGUMENT

The Fourth Circuit properly imposed upon the plaintiffs the burden, in their prima facie case, to account for those variables reasonably viewed as determinants of salary. This Court should affirm that standard, and also should require a plaintiff to prove several specific elements, as part of its prima facie case, when attempting to use a multiple regression analysis to show a pattern or practice of disparate treatment.

First, a plaintiff should be required to account for the variables relevant to an employer's salary deter-

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Petitioners. "NAACP Br." refers to the Brief for the Petitioners, NAACP Legal Defense & Educational Fund, Inc. "NCAES Br." refers to the Brief for the Respondents, William C. Friday, *et al.*

mination, a requirement met by initially ensuring that the theoretical foundation of its regression analysis "fits" the particular facts of the case. Thus, a plaintiff's regression analysis should include relevant objective and quantifiable variables that are likely to affect salary determinations. Second, if a variable is truly unquantifiable, the plaintiff should be required at a minimum to substitute a suitable "proxy" for the relevant variable, or account for the variable through other evidence. In addition, a plaintiff should not be excused from the duty to account for a variable merely because it is arguably "tainted," or allegedly masks an employer's discrimination, since the resolution of whether the variable is in fact tainted is a question of fact to be decided by the trial court. Also, a plaintiff's regression normally should focus upon employment decisions made during the relevant time period.

Legal and logical considerations favor adherence to this standard. First, it is consistent with the plaintiff's customary burden in a disparate treatment case to establish an employer's discriminatory intent. Imposition of this burden is particularly important in a pattern or practice case, since a plaintiff under that theory at all times maintains the responsibility for proving by a preponderance of the evidence that race discrimination "was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. Finally, such burden is not onerous, but rather merely requires the plaintiff to eliminate the most likely nondiscriminatory reasons for any observed disparity in

order to establish a prima facie case of discrimination.

The Fourth Circuit also applied the proper burden of proof standards in finding that, even if the plaintiffs established their prima facie case, the defendants rebutted it. The appropriate rebuttal standard, as conceded by both plaintiffs herein, requires a defendant *only* to articulate or "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff," not to "persuade the court that it was actually motivated by the proffered reasons." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254-55. This rebuttal standard, requiring a defendant only to show that a plaintiff's regression is flawed in its assumptions, data or analysis, is especially important in a case involving a pattern or practice of disparate treatment. Of course, this articulation must be "clear and reasonably specific," and must have some basis in the facts as developed in discovery or otherwise, but a defendant clearly is not required to disprove a plaintiff's case. Finally, as this and other courts have noted, this standard is appropriate since the defendant usually will attempt to show at rebuttal that its practices were lawful, and since liberal discovery rules permit a plaintiff access to the relevant information needed to establish its case.

ARGUMENT

THE COURT OF APPEALS PROPERLY ALLOCATED THE BURDENS OF PROOF IN THIS DISPARATE TREATMENT PATTERN OR PRACTICE CASE INVOLVING THE USE OF A MULTIPLE REGRESSION ANALYSIS

The Fourth Circuit below rejected the plaintiffs' statistical proof because it believed that the plaintiffs failed to establish a prima facie case of intentional discrimination, and found that the defendants would have rebutted any inference of discrimination. In doing so, the court established appropriate burdens of proof for both plaintiffs and defendants in a pattern or practice disparate treatment case where multiple regression analyses are used.[2]

While this case involves the use of a number of complicated statistical analyses, including multiple regression analyses, it is at bottom a relatively simple burden of proof case, in which the parties' respective burdens are defined clearly under previous decisions of this Court. In fact, all parties herein agree that the defendant's burden in such cases is that laid out by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See* NAACP Br. at 53; Justice Br. at 25 n.23.

All parties concede, and the courts below properly viewed this case to be a disparate treatment case. Dis-

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[2] EEAC takes no position on whether the plaintiffs in this case established a timely claim under Title VII for current wage disparities that result from pre-Act discrimination. Rather, EEAC's brief is limited to a discussion of the proper burdens of proof in a class action or pattern or practice case involving the use of multiple regression analyses.

parate treatment is concerned with those situations where an employer "simply treats some people less favorably than others *because of* their race, color, religion, sex, or national origin." *Teamsters*, 431 U.S. at 335 n.15 (emphasis added). Proof of discriminatory motive is the central inquiry. *Id.* To establish discriminatory motive in a disparate treatment case, this Court has required a three-part order and allocation of proof. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Briefly, a plaintiff may establish a prima facie case by producing evidence "adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358, and by "eliminating the most common nondiscriminatory reasons for the employer's actions." *Burdine*, 450 U.S. at 255.[3] A plaintiff carries the burden of showing "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.'" *Furnco*, 438 U.S. at 576, citing *McDonnell Douglas* (emphasis added).

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[3] *McDonnell Douglas* permits the plaintiff to establish a prima facie case by showing "(i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. The four *McDonnell Douglas* requirements, however, are not an inflexible formula, but "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The defendant then must "articulate," or come forward with, evidence of "some legitimate, nondiscriminatory reason" for its actions, *McDonnell Douglas*, 411 U.S. at 802, or "provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 431 U.S. at 360 n.46. If the defendant carries this burden, the plaintiff has the opportunity to show that the proffered reasons are "pretextual," that they were not the true reasons for the employer's action, and that the true reasons were discriminatory. *McDonnell Douglas*, 411 U.S. at 804-05. The burden of proof remains at all times with the plaintiff. *Burdine*, 450 U.S. 248. As detailed below, these basic principles are fully and readily applicable to pattern or practice cases involving the use of multiple regression analyses.

I. To Establish A Prima Facie Case Of An Employer's Pattern Or Practice Of Disparate Treatment, A Plaintiff's Multiple Regression Analysis Must Account For Variables Reasonably Viewed As Determinants Of Salary

This Court has recognized that "statistics can be an important source of proof in employment discrimination cases." *Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977). In fact, statistics generally, and multiple regressions specifically, often play an important role in proving a pattern or practice of discrimination. This Court has recognized, however, that statistical proof's "usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340. It is precisely "[b]ecause of the significant role that statistics can play in discrimination cases" and because of their "inherently slippery nature" that "it is imperative that they be used properly." *Wilkins v. University of*

Houston, 654 F.2d 388, 395 (5th Cir.), *vacated and remanded on other grounds*, 459 U.S. 822, *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983); *see also EEOC v. Federal Reserve Bank*, 698 F.2d 633, 645 (4th Cir. 1983), *rev'd and remanded on other grounds sub nom., Cooper v. Federal Reserve Bank*, —— U.S. ——, 104 S.Ct. 2794 (1984).

Multiple regression is a "relatively sophisticated means of determining effects that any number of different factors have upon a particular variable." *Wilkins*, 654 F.2d at 402-03.[4] Thus, the "validity of the [regression] and the significance of its results" must be examined, *id.* at 403, to determine the " 'ex-

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[4] A multiple regression analysis is concerned with the effect that various independent variables (such as race, sex, seniority or education) might have on a dependent variable (such as salary). In other words, a regression analysis, in appropriate cases, can help determine to what extent race may have been a factor in the salary received by certain employees. Thus, the purpose of a regression analysis regarding alleged pay discrimination on the basis of race "is to determine whether a [racial] difference in pay persists when one factors out the possible effects of other variables." D. Bloom and M. Killingsworth, *Pay Discrimination Research and Litigation: The Use of Regression*, 21 Indus. Rel. L.J. 318, 321 (1983). With a multiple regression, "one first specifies the major variables that are believed to influence the dependent [salary] variable." F. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702, 705 (1980). "The relationship between the dependent variable and the independent variable of interest is then estimated by extracting the effects of the other major variables. . . ." *Id.* at 706. Those results "can be read as showing the effects of each variable on the dependent variable, holding the others constant. Moreover, those results allow one to make statements about the probability that the effect described has merely been observed as a result of chance fluctuation." *Id.*; *see* D. Baldus and J. Cole, *Statistical Proof of Discrimination* § 8.022[1] (1980 & Supp. 1985).

istence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination which is drawn,'" *Federal Reserve Bank*, 698 F.2d at 645, *quoting White v. City of San Diego*, 605 F.2d 455, 460 (9th Cir. 1979). The Fourth Circuit properly stated *generally* that a plaintiff's regression must account for variables reasonably viewed as determinants of salary, but it is imperative to delineate several *specific* elements of that standard which this Court should require for a plaintiff's regression analysis to establish a prima facie case of a pattern or practice of disparate treatment.

A. A Plaintiff Has The Burden To Account For Relevant Variables

1. *The Plaintiff's Regression Must Include The Relevant Objective And Quantifiable Factors Actually Used By The Employer To Make Salary Determinations*

The specific elements of the general standard outlined by the Fourth Circuit flow logically from that standard. First, a plaintiff must relate the theoretical foundation of its regression analysis (in this case, the variables believed to influence salary) to the method *actually used* by the employer to make the decisions under scrutiny. This requirement is often referred to by statisticians as "goodness of fit." *See, e.g., EEOC v. Sears, Roebuck & Co.*, C.A. No. 79C 4373 (E.D. Ill. Jan. 31, 1986), *reprinted in* Daily Labor Report (BNA) D-1, D-6 (Feb. 6, 1986); Baldus and Cole § 8.2; T. Campbell, *Regression Analysis In Title VII Cases: Minimum Standards, Comparable Worth and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299, 1303 (1984); Fisher at 716.

The statistical "model must be hypothesized to link the influences with the outcome," Campbell at 1302, a hypothesis that usually is formed during discovery, and which yields potential explanatory variables that are believed to affect salary. *See Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir. 1983), *cert. denied sub nom., James v. Tennessee Valley Authority*, 465 U.S. 1066 (1984); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 (4th Cir. 1980); *Penk v. Oregon State Board of Higher Educ.*, C.A. No. 80-436, slip. op at 379-380 (D. Or. Feb. 13, 1985).[5] These variables in the instant case, as recognized by the Fourth Circuit, include education, tenure, job title, work performance and county-by-county disparities. *Bazemore v. Friday*, 751 F.2d 662, 672 (4th Cir. 1984).

The burden to construct a theoretical model that "fits" places the concomitant burden upon a plaintiff to include in its regression those objective and quantifiable variables *relevant* in actually determining wages. *EEOC v. Sears* at D-6 & n.8. Many courts have imposed this relevance requirement, and have examined closely those factors included or omitted from a plaintiff's regression. For example, the court

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[5] The failure to establish a theoretical foundation represents a significant problem for plaintiffs attempting to use a regression analysis to establish a prima facie case. In fact, one commentator in 1984 noted that "in only eight reported cases has the opinion reflected any attempt to measure whether the model was appropriate for the data." Campbell at 1306-07. The commentator also noted that "evidence of the model's appropriateness and the closeness of its fit may have been introduced at trial [in other cases] but not included in the opinion. If so, judges are not exhibiting adequate concern for a fundamental aspect of statistical proof, important upon appellate review." Campbell at 1307 n.22.

in *EEOC v. International Business Machines Corp.*, 583 F. Supp. 875, 906 (D. Md. 1984), found that the plaintiff's omission of relevant factors such as seniority, job level and class groupings rendered the results of its multiple regression analysis "useless." The court in *Tolliver v. Yeargan*, 567 F. Supp. 116 (S.D. Ark. 1983); *aff'd*, 728 F.2d 1076 (8th Cir. 1984), also held that the plaintiff had not established a prima facie case in part because its regression failed to account for school-by-school differences in salary. Another court found that the plaintiff's regression was "rife with methodological and analytical flaws, and therefore is not credible," partly because the analysis failed to account for the defendant's across-the-board percentage increases, as well as discretionary or merit increases. *Coser v. Moore*, 587 F.Supp. 572, 599 (E.D.N.Y. 1983), *aff'd*, 739 F.2d 746 (2d Cir. 1984).[6]

It is clear, therefore, that a plaintiff does not establish its prima facie case when it relies solely upon a regression analysis that does not account for

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[6] *See also EEOC v. Sears* at D-37 (failure to account for, *inter alia*, job performance and the employer's decentralized decision-making made plaintiff's statistics "so flawed that they lack any persuasive value"); *EEOC v. Hartford Fire Insurance Co.*, 31 FEP Cases 531, 545 (D.D.C. 1983) (failure to account for several relevant variables which might have influenced an employee's salary, including age, employment experience, work performance and tenure); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 803 (5th Cir. 1982); *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983) (failure to control for rank); *Eastland*, 704 F.2d at 623 (failure to control for job category casts doubt on regression); *Valentino v. United States*, 511 F. Supp. 917, 945 (D.D.C. 1981), *aff'd* 674 F.2d 56 (D.C. Cir. 1982); *Agarwal v. Arthur G. McKee & Co.*, 19 FEP Cases 503 (N.D. Cal. 1977), *aff'd*, 644 F.2d 803 (9th Cir. 1981).

relevant objective and quantifiable variables. Moreover, to shift the burden of persuasion to the defendant based upon a poorly fitted or incomplete regression would violate the standards of proof articulated by this Court in *Teamsters* and *Burdine*, as discussed *infra*.

2. Where The Plaintiff's Regression Does Not Account For Subjective And Unquantifiable Variables, Evidence Regarding These Relevant Variables Must Be Introduced In Some Other Form To Establish A Prima Facie Case

In some instances, a regression analysis may be unable to account for truly unquantifiable variables, such as job prefereces or motivation. Note, *Title VII, Multiple Linear Regression Models, and the Courts: An Analysis*, 46 Law & Contemp. Probs. 282, 286-7 (1983); *See* M. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum. L. Rev. 737, 742 (1980). It is obvious, however, that employers do, in fact, make employment decisions based upon unquantifiable differences between employees (job performance, in many instances), a practice that is "permissible and necessary under Title VII." *Penk*, slip op. at 387; *see also EEOC v. Sears* at D-38. These unquantifiable variables, in fact, may significantly affect the salaries paid to particular employees. It follows, therefore, that a court cannot correctly hold that plaintiffs have established a prima facie case where their regression fails to account for the actual "processes used . . . to make employment decisions." *Penk*, slip op. at 388; *see EEOC v. Sears* at D-38; *Agarwal*, 19 FEP Cases at 506; *Coser*, 587 F. Supp. at 599.

Plaintiffs, certainly, can use non-statistical evidence to account for the actual processes used by an

employer to make the decisions under scrutiny. In fact, a regression may not be an appropriate means by which to infer discrimination from an employer's compensation scheme, if the factors affecting compensation cannot be quantified. *EEOC v. Sears* at D-39. In the situation where a plaintiff fails to account for the factors affecting compensation, either with a regression or with other evidence, the district judge should dismiss the claim for failure to establish a prima facie case.

Plaintiffs will not be unduly hindered by the imposition of this requirement to account for relevant unquantifiable variables. If a plaintiff wishes to use a regression analysis, instead of other relevant evidence, suitable "proxies" sometimes can be used to estimate variables such as "productivity." [7] The court in *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983), for example, substituted rank as a proxy for productivity. In fact, NCAES in the instant case used the quartile ranking system for productivity, a factor which plaintiffs chose not to incorporate into their regression. Of course, a proxy may not represent a relevant variable exactly. Where an appropriate proxy is not available, it is imperative that a plaintiff prove its case with other evidence.

Plaintiffs often object to any requirement that they account for subjective factors which are alleged to be "tainted," or which allegedly mask an employ-

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[7] A proxy attempts to measure a variable which seems unquantifiable in its pure form. For example, while a regression analysis can account for productivity in a job where the measurement is widgets produced per hour, it may not be able to measure research quality or student teaching in a university setting. *See, e.g., Penk,* slip op. at 385. The proxy purports to measure the apparently unquantifiable factor by substituting another measurement.

er's discrimination. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Greenspan v. Automobile Club of Michigan*, 495 F. Supp. 1021, 1064 (E.D. Mich. 1980); *Melani v. Board of Higher Educ.*, 561 F. Supp. 769, 778 (S.D. N.Y. 1983). This objection lacks persuasive appeal, however, since whether a variable is tainted depends upon the district court's ultimate ruling on whether there has been discrimination in the employer's application of that factor. Absent persuasive extrinsic evidence that the variable was in fact "tainted" by unlawful discrimination, the plaintiffs should be required to include such a variable in their regression analysis. *See EEOC v. Sears* at D-41. Allowing the plaintiffs to exclude the variable from their regression merely because they have *alleged* that the factor was applied discriminatorily would presuppose that discrimination occurred. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

Thus, a plaintiff has the specific burden to include in its regression analysis the relevant factors used by the employer to determine salaries. Seemingly subjective or unquantifiable factors may be represented in the analysis by suitable proxies, but where suitable proxies are not available, unquantifiable factors affecting salary must be taken into account by the production of other evidence of discriminatory intent. Plaintiffs also must account for evidence that is arguably tainted unless plaintiffs can prove, with persuasive extrinsic evidence, that the variable actually masks the employer's discrimination. Ultimately, therefore, plaintiffs must account for the factors used

by the employer to make its decisions, or risk failing to establish a prima facie case.[8]

B. The Requirement That A Plaintiff Using A Regression Analysis Account For Relevant Variables As Part Of Its Prima Facie Case Is Consistent With The Legal Requirements And Logical Basis For Establishing A Pattern Or Practice Of Disparate Treatment

Legal and logical reasons favor imposing upon a plaintiff the burden to establish, at the prima facie case stage, that its statistics account for relevant variables that may have affected salary determinations within the relevant time period. This burden is not overly stringent; rather, it is simply a specific application of the plaintiff's normal burden in a disparate treatment case, which is to establish proof of an employer's "discriminatory motive" or intent. *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, —— U.S. —— (1984); *Penk*, slip op. at 403.

Adherence to this standard is especially important where a plaintiff alleges a *pattern or practice* of disparate treatment, since under that theory a plaintiff must show by a preponderance of the evidence that the alleged discriminatory practice is the "company's standard operating procedure—the regular rather than the unusual practice." *Cooper*, 104 S. Ct. at 2800, *citing Teamsters* at 336. Such a wholesale

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[8] While EEAC takes no position regarding whether the plaintiffs in the instant case established a timely claim under Title VII for current wage disparities resulting from pre-Act discrimination, it is important to stress that regression analyses normally should focus on employment decisions made during the relevant time period. *See Valentino*, 511 F. Supp. at 944, 955; *see generally Hazelwood*, 433 U.S. at 309; *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

attack on an employer's standard operating procedure "must be one based upon a specific intent to discriminate against an entire group, to treat it as a group less favorably because of [race]." *EEOC v. International Business Machines Corp.*, 583 F. Supp. at 903, *citing Stastny*, 628 F.2d at 274 n.10. A plaintiff alleging disparate treatment, of course, always bears the prima facie burden to "eliminate[] the most common nondiscriminatory reasons for the employer's action." *Burdine*, 450 U.S. at 254. But where the attack is directed at an employer's entire operating procedure, it is particularly important that the plaintiff's evidence account for variables that might legitimately explain differences in measured results.

This standard has intuitive appeal given the ultimate factual issue before the district court in a case of this type: whether the defendant both *intentionally* and as a *standard operating procedure*, discriminated against the plaintiffs. Thus, it makes little sense to permit a plaintiff to establish its initial burden with statistics that fail to account for the primary factors that are likely to affect salary.

Requiring a plaintiff to account for such factors is entirely reasonable. The Justice Department, a plaintiff herein, has noted that the Fourth Circuit "clearly would have erred if it had held, as private petitioners assert in their Questions Presented, 'that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable.' " Justice Br. at 21. Of course, the court below did not impose this onerous "every conceivable variable" burden on plaintiffs. Rather, as the Justice Department itself acknowledges, "the appellate court articulated

the correct rule, that a plaintiff's statistical analyses in a disparate treatment case must include 'variables which ought to be reasonably viewed as determinants of salary.'" *Id.* This burden is one which properly allocates the relative burdens between plaintiffs and defendants and, with the further requirement that a plaintiff account, either through its regression analysis or otherwise, for relevant variables, will provide adequate guidance to future litigants.

II. A Defendant Need Only Articulate A Nondiscriminatory Reason For Its Conduct By Identifying A Relevant Variable Omitted From Plaintiff's Regression, And Need Not Disprove Plaintiff's Case At Rebuttal

The Fourth Circuit below rejected the plaintiffs' regression analysis because the court determined that plaintiffs failed to establish a prima facie case. *Bazemore*, 751 F.2d at 672. The court went on to find that even "assum[ing] that a prima facie case was made . . . it has been completely refuted [by NCAES]." *Id.* at 687. It is important for the present discussion to examine what the law currently requires a defendant to produce to rebut a plaintiff's prima facie case, and how that theoretical burden should be applied in a regression case.

Once a plaintiff establishes an inference of intentional discrimination by proving a prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the challenged action, *McDonnell Douglas*, 411 U.S. at 802, or to "provide a nondiscriminatory explanation for the apparently discriminatory result." *Teamsters*, 434 U.S. at 360 n.46; *Burdine*, 450 U.S. at 255. This *Burdine* standard, conceded as applicable by NAACP in its brief at 53 and by the Justice Department in its brief at 25 n.23, requires that the defendant "clearly

set forth, through the introduction of admissible evidence, the reasons for [its actions]." *Burdine*, 450 U.S. at 255. This concession by the petitioners is important, because defendant's burden is then merely to "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff," *not* to "persuade the court that it was actually motivated by the proffered reasons." *Id.* at 254-55.

Thus, the *Burdine* standard, as applied to a pattern or practice case involving regression analyses, permits a defendant to meet its burden *either* (1) by showing that a plaintiff's regression is flawed in its assumptions, data or analysis; *or* (2) by demonstrating, through its own analysis, that there does not exist a significant statistical disparity. *Teamsters*, 431 U.S. at [illegible] 9-40; See B. Schlei and P. Grossman, *Employment Discrimination Law* (BNA) 1323 (2d ed. 1983).

The defendant's articulation, of course, must be "clear and reasonably specific." *Burdine*, 450 U.S. at 258. Typically, this burden of specific articulation in a regression case will be met when the defendant identifies a relevant variable that is likely to have affected salary, which is omitted from the plaintiff's regression or otherwise is unaccounted for in the plaintiff's evidence. This identification of an omitted variable will "raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff," *id.* at 254-55, and will also provide the plaintiff with a full and fair opportunity to demonstrate pretext at the next stage of proof. *Id.* at 258; *see Sweeney v. Research Foundation*, 711 F.2d 1179 (2d Cir. 1983); *Grano v. Department of Develop-*

ment, 699 F.2d 836, 837 (6th Cir. 1983); *White v. Vathally*, 732 F.2d 1037 (1st Cir.), 469 U.S. ——, *cert. denied*, 105 S.Ct. 331 (1984); *See also* Schlei and Grossman (Supp. 1983-84) at 250.

The two alternative methods of rebutting a plaintiff's case—identifying an omitted variable or presenting a more appropriate regression—will not result in a "nonexistent" level of proof as plaintiffs fear. Under the first method, a defendant's articulation of an omitted variable will raise more than theoretical or hypothetical objections to a plaintiff's regression. *Trout v. Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983), *vacated and remanded on other grounds*, 465 U.S. 1056 (1984); *Penk*, slip op. at 404. Normally, this articulation will be grounded in the facts as determined during discovery. Alternatively, if a defendant chooses to present a more appropriate regression, its model normally will focus the issues by demonstrating that the inclusion of different or additional variables may affect the outcome.

Under no circumstances, however, should the defendant be required at rebuttal to "rework plaintiff's statistics" by "incorporating the omitted factor," or to demonstrate "how specific errors" actually have affected the statistical results obtained from the plaintiff's model, as some courts have required. *See, e.g., Trout*, 702 F.2d at 1102; *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984); *Segar v. Civiletti*, 508 F. Supp. 690, 712 (D.D.C. 1981), *rev'd in part sub nom., Segar v. Smith*, 738 F.2d 1249 (D.C. Cir.), *cert. denied sub nom., Meese v. Segar*, 105 S.Ct. 2357 (1985). As noted by the Justice Department, these

cases rely on *Teamsters* for the relevant burden standards. Justice Br. at 25 n.23. "But the pattern of proof in *Teamsters* does not differ significantly from that stated in *Burdine*," a standard which should only require a showing of "inaccurate or insignificant" proof or providing a "nondiscriminatory explanation," not the more burdensome standard of persuasion. *Id.* Thus, while the employer always has the option of offering its own regression analysis to offset the plaintiff's prima facie showing, it is not required to do so.

Other policy reasons stated by this Court favor imposing the traditional *Burdine* rebuttal standard upon a defendant in a pattern or practice disparate treatment case. As this Court stated in *Burdine*, a limited evidentiary obligation will not "unduly hinder the plaintiff." 450 U.S. at 258. At the "pretext" stage, the plaintiff will have the opportunity to show that the defendant's stated reason has no basis in fact, and that its real reason was a discriminatory one, which, if proven, ends the inquiry.

This Court has noted a final reason why a plaintiff will not be disadvantaged by a defendant's limited evidentiary obligation at the rebuttal stage. "[L]iberal discovery rules applicable to any civil suit in federal court" allow the plaintiff to become aware, at an early stage, of the relevant facts making up the employer's decision. *Id; see also Penk*, slip op. at 398. This rationale is especially appropriate in the instant case, where the extensive discovery prior to the plaintiff's development of its statistical regression should have alerted it to the fact that NCAES would claim that across-the-board increases, county-

by-county disparities, and merit differentials would account for significant wage disparities.[9]

The *Burdine* and *Teamsters* rebuttal standard, therefore, requires the defendant to identify clearly and specifically a relevant variable omitted from a plaintiff's regression, or otherwise not accounted for by the plaintiff's evidence. This identification properly focuses the inquiry, yet reinforces plaintiff's ultimate burden of proving, either with a regression analysis or with other evidence, that the employer engaged in a pattern or practice of intentional discrimination.

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[9] The Justice Department argues that it "should be excused from including" the county-by-county variable in its regression even though it is a "major salary-affecting variable," because this factor was not revealed "until the brink of trial." Justice Br. at 30 & n.30. NCAES responds that depositions conducted before 1975, and again in July 1981 revealed this factor as important. *See* NCAES Br. Regardless of whether plaintiffs were *actually* notified, the argument of the Justice Department may well be legally irrelevant, since lack of actual notice does not obviate a plaintiff's responsibility to account for a relevant factor that it should have been aware of through discovery. *See* discussion, *supra*, at 8-17.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges this Court to clarify the respective burdens of proof that rest upon plaintiffs and defendants in cases involving the use of multiple regression analyses, as set forth herein.

Respectfully submitted,

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